

# "Every Day and in Every Way We Are All Becoming *Meta* and *Meta*,"<sup>1</sup> or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)

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## I. INTRODUCTION

*Meta* argument<sup>2</sup> goes beyond the frame of reference of another person to a conversation to trump that person's views with those of a higher<sup>3</sup> order.<sup>4</sup> A

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<sup>1</sup> This particular paraphrase of a well-known psychotherapeutic mantra is commonly attributed to John Wisdom, a twentieth-century, British, ordinary-language philosopher and philosopher of the mind. See Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, in COLOR CLASS IDENTITY: THE NEW POLITICS OF RACE 11, 11 (John Arthur & Amy Shapiro eds., 1996); Paul Greenberg, *How an Obscure Brown Department Trained Graduates to Crack the Codes of American Culture—and Infiltrate the Mainstream*, BOSTON GLOBE, May 16, 2004, at E2; Metatheatre, <http://instruct1.cit.cornell.edu/Courses/engl327/327.meta.html> (last visited Aug. 26, 2007). The original, "Every day and in every way I am becoming better and better," was the invention of Emile Coué, a French pharmacist who developed a method of psychotherapy based on auto-suggestion, or self-hypnosis, characterized by the frequent repetition of the above statement. See EMILE COUÉ, SELF MASTERY THROUGH CONSCIOUS AUTOSUGGESTION (Kessinger Publishing 1997) (1922). The argument for communitarian bargaining has many of the same hypnotic properties as Coué's mantra and, also like the mantra, has customers who swear that it works.

<sup>2</sup> *Meta* argument is not to be confused with *meta*-analysis, a quantitative method in social science for synthesizing entire bodies of research and identifying the variables that might have affected the research's outcomes. See Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 203–05 (2007), available at <http://ssrn.com/abstract=910962> (last visited Mar. 4, 2008); see also ROBERT ROSENTHAL, META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH (rev. ed. 1991). Meta-analysis is beginning to appear in legal bargaining scholarship. See Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597 (2006).

<sup>3</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 730 (10th ed. 1996) (meta - "situated behind or beyond... more highly organized... more comprehensive[,] transcending"); OXFORD ENGLISH DICTIONARY ONLINE (draft rev. Dec. 2001),

speaker paraphrases the other person's position, usually in a slightly caricatured form, and then rejects it as simplistic, beside the point, or incomplete, judged from the speaker's more fully developed perspective.<sup>5</sup> He<sup>6</sup> disposes of opposing contentions without responding to them directly, or as they were expressed originally, shifting the ground on which the conversation is based to take it off in a slightly—and sometimes greatly—different direction. In the process, he tells the other person something new about the nature of both that person's views and the subject about which they make a claim, and implies that she should have thought about the subject from this more complete perspective before she spoke. He says, tacitly, "I understand this topic in more dimensions than you and because of that, you should defer to me." *Meta* argument has special force in the academy because academics do not like to be told that they have missed something. Not being aware of all of the ideas necessarily in play in a conversation is deflating for people who more frequently are enamored of conceptual sophistication than practical consequences. When told they "don't get it," academics often clam up, even when not certain the charge is warranted, to avoid being intellectually embarrassed. This is a pyrrhic victory, of course, since in academic discourse, silencing another is almost as noteworthy as convincing him.

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<http://dictionary.oed.com> (last visited Mar. 4, 2008) (meta- "beyond, above, at a higher level").

<sup>4</sup> See, e.g., STEVEN J. BRAMS & ALAN D. TAYLOR, *THE WIN-WIN SOLUTION: GUARANTEEING FAIR SHARES TO EVERYBODY*, at ix (1999) [hereinafter BRAMS & TAYLOR, WIN-WIN] ("Since the publication of . . . *Getting to Yes* . . . it has been widely recognized that there is a . . . 'high ground' . . . between winning and losing in negotiations.").

<sup>5</sup> See, e.g., ROBERT H. MNOOKIN, SCOTT R. PEPPE, & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 287 (2000) ("By naming the strategic problem created by . . . a question, you can sometimes dissuade the other side from pursuing an answer to it. And you show that you understand the strategic landscape and their motivation for asking. This can take the power out of such inquiries.").

<sup>6</sup> Readers should substitute opposite-gender pronouns throughout the article wherever desired. I have randomized the pronoun selection process except where context did not permit.

## HOW COMMUNITARIAN BARGAINING CONQUERED THE WORLD

The communitarian<sup>7</sup> challenge to the adversarial<sup>8</sup> conception of legal dispute bargaining, perhaps the most important development in the legal bargaining literature in the last twenty-five years,<sup>9</sup> is, in its basic nature and in many of its specific manifestations, a form of *meta* argument.<sup>10</sup> It expands the frame of reference against which conceptions of bargaining are to be judged and shows how the adversarial conception falls short when measured against this expanded frame of reference.<sup>11</sup> Ironically, however, *meta*

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<sup>7</sup> See Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limits of a Communitarian Conception of Legal Dispute Bargaining: or Why We Can't All Just Get Along*, 9 Cardozo J. Confl. Resol. 301 n.3 (2008) [hereinafter Condlin, *Bargaining with a Hugger*] (describing communitarian bargaining); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 151 (2002) (describing frequently used synonyms for "communitarian" bargaining, including: cooperative, problem-solving, integrative, value-creating, soft, principled, and accommodating).

<sup>8</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 765–94 (1984) (describing adversarial bargaining). Frequently used synonyms for "adversarial" bargaining include: positional, competitive, zero-sum, hard, and distributive. DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 14–15 (1989) ("no consistent nomenclature of negotiation strategies exists in either the legal or social scientific literature"—using "competitive," and "distributive"); Menkel-Meadow, *supra*, at 764–66 (using "adversarial," "zero-sum," and "distributive"); ROGER FISHER & WILLIAM URY, *GETTING TO YES* 3–8 (1981) (using "positional" and "hard"). I prefer "adversarial" because the term has a longer history in legal scholarship and a more familiar meaning. It also describes the nature of the bargaining style communitarians object to more accurately and evocatively. "Positional" is probably the most popular alternative, but it is particularly inapt. It is not possible to converse at all without taking positions. Even the statement of an interest is simultaneously the statement of a "position"—i.e., "my position is that it is in my interest to \_\_\_\_\_." It is probably not position-taking that communitarians object to, but the unreasonable refusal to reconsider and revise a position under any circumstances, and the term adversarial seems to capture this idea better.

<sup>9</sup> See Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 485–87 (2006), available at <http://ssrn.com/abstract=943009> (last visited Mar. 4, 2008) (describing how communitarian bargaining theory has "revolutionized how negotiation is taught in law schools").

<sup>10</sup> BRAMS & TAYLOR, *WIN-WIN*, *supra* note 4, at ix (describing communitarian theory as representing the "high ground" in the debate over competing conceptions of negotiation).

<sup>11</sup> Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 97–98 (2001) ("I began talking about legal problem solving in the 1970s, while attempting to reframe the way lawyers approached legal negotiations, suggesting that a different mind-set, orientation or

argument itself can be an adversarial bargaining technique and in using it, communitarians run the risk of adopting an approach they profess to reject, emulating their adversarial counterparts more than providing an alternative to them.<sup>12</sup> Communitarians also believe in openness, candor, respect, and a communal perspective toward settlement, and are against deception, dishonesty, belligerence, and exclusively self-interested thinking.<sup>13</sup> Yet, many communitarian criticisms of adversarial bargaining are themselves surprisingly combative, exclusivist, and manipulative, both in tone and content, and they exploit ignorance and insecurity as often as they identify and correct analytical error. All too frequently, these arguments look like self-interested strategies for competing successfully for academic stature and influence more than collaborative overtures to colleagues to work out problems of bargaining theory together. Surprisingly, communitarians often seem more interested in ruling the world of bargaining theory than in improving it.

This communitarian use of adversarial methods, self-consciously or otherwise, is a strange phenomenon, a sort of behavioral violation of the principle of non-contradiction, and its prominence in the bargaining literature should give one pause in judging the merits of the communitarian argument. Action is often a better indicator than talk of what a person truly believes, so

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framework, which I called problem-solving, would produce both better outcomes and processes than the more conventional, adversarial approach to legal negotiations.") (footnote omitted).

<sup>12</sup> I do not mean to say that *meta* argument inevitably must be adversarial—one could expand the frame of reference of a conversation in a supportive and collegial manner—but just that communitarians have used their expanded conception of effective bargaining to criticize and supplant adversarial bargaining rather than supplement and refine it. Ordinarily, communitarians would view this kind of win-lose approach to conversation as characteristic of the adversarial method. I give examples of this criticism throughout the discussion.

<sup>13</sup> Barbara Gray, *Negotiating With Your Nemesis*, 19 NEGOT. J. 299, 299–310 (2003) (describing the process of openly expressing emotion to an adverse negotiator); Michael W. Morris & Dacher Keltner, *How Emotions Work: The Social Functions of Emotional Expression in Negotiations*, 22 RESEARCH IN ORG. BEHAVIOR 1, 1–50 (2000) (describing rapport-building communication methods of problem-solving negotiation); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 52–57 (1985) (describing how cooperative bargainers seek to reach solutions which are "fair and equitable to both parties and seek to build an interpersonal relationship based on trust"); Schneider, *supra* note 7, at 164–65 (describing problem-solving negotiators as "courteous, friendly, tactful, cooperative . . . honest, forthright, trustful, sincere . . . [and not someone who would] make unfair representations, use haranguing or offensive tactics, make threats, or advance unwarranted claims").

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that when someone says one thing and does another, one takes him literally at one's peril. Besides, if adversarial methods are needed to demonstrate the ineffectiveness of adversarial methods, there is some question whether the point has truly been made. In a sense, the scholarly debate over the relative merits of communitarian and adversarial conceptions of legal bargaining is a negotiation of sorts, in which each side advances arguments and makes proposals in response to equivalent moves by the other. From this perspective, communitarians often bargain more adversarially than their allegedly<sup>14</sup> adversarial counterparts and this makes their argument a form of "do what I say, not what I do" advice, when "what I say" is ideologically and aesthetically derived.

I discuss the foregoing claims in the following manner. In the first part of Section II, I describe the communitarian critique of adversarial bargaining—that it is gratuitously belligerent, polarizes relationships, wastes resources, retards social development, and prevents agreements that might otherwise be reached—and show how the manner in which this critique is expressed often exemplifies the very behaviors it seeks to criticize. I take the communitarian critique from articles reproduced in the principal texts used to teach bargaining in American law schools.<sup>15</sup> These articles, all the work of highly regarded scholars, present the best case for communitarian methods and, because of their prominence, are likely to have the greatest influence on law students' and lawyers' understanding of legal bargaining.

In the second part of Section II, I describe the other side of the coin, the normative and empirical case for communitarian bargaining. I show how these arguments, perhaps even more so than their critical counterparts, employ sophisticated reworkings of familiar rhetorical strategies to make the communitarian case. It is as if, unknowingly, communitarians set out to refine adversarial methods rather than replace them, to develop more effective strategies for competing successfully in an adversarial world rather

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<sup>14</sup> I hope to show that the communitarian description of adversarial bargaining is often overdrawn and that many of the objections to its methods lack real support.

<sup>15</sup> See generally CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* (2d ed. 2005); ALAN SCOTT RAU, EDWARD F. SHERMAN, & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (3d ed. 2002); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (5th ed. 2005); CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER, & LELA PORTER LOVE, *NEGOTIATION: PROCESSES FOR PROBLEM SOLVING* (2006); JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2006); *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) [hereinafter *NEGOTIATOR'S FIELDBOOK*].

than reconstruct that world along communitarian lines. In a sense, they identified the enemy and it was they.<sup>16</sup>

## II. IS COMMUNITARIAN BARGAINING THEORY TRULY COMMUNITARIAN?

By its own account, communitarian bargaining is nothing if not communal.<sup>17</sup> From its conception of the nature of legal disputing to its definition of proper and effective bargaining technique, it looks at bargaining from the perspective of what is good for the social group rather than the single individual, and from the time frame of a lifetime in bargaining rather than a single encounter.<sup>18</sup> In a communitarian world the only good settlement is a lasting one, and for any single member of a group to be satisfied, all must be satisfied. As a consequence, communitarian theory gives the highest priority to working in unison with others, creating hybrid strategies for solving common problems, and pursuing shared objectives.<sup>19</sup> In theory, it combines, incorporates, shares, and joins rather than divides, destroys, conceals, and controls.<sup>20</sup> It builds bridges rather than barriers.<sup>21</sup> It is against

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<sup>16</sup> Apologies to Walt Kelly. See WALT KELLY, *WE HAVE MET THE ENEMY AND HE IS US* (1972). For the history of the expression, see Marilyn White, *I Go Pogo*, [http://www.igopogo.com/we\\_have\\_met.htm](http://www.igopogo.com/we_have_met.htm) (last visited Oct. 2, 2007).

<sup>17</sup> For a summary of the most important properties of communitarian bargaining, see Menkel-Meadow, *supra* note 9, at 491 ("Among the most important contributions of [communitarian theory] was the focus on 'joint' or mutual, rather than individual, gain."). For a grandiose paraphrase, see *id.* at 492 (communitarian theory "turned negotiation into a deontological Kantian project of treating all people as ends, not means, for mutual benefit, not self-interested Hobbesian coexistence.").

<sup>18</sup> See Gifford, *supra* note 13, at 50–54; Menkel-Meadow, *supra* note 8, at 802 (the communitarian negotiator "consider[s] how the [parties'] needs may change over the long run").

<sup>19</sup> John S. Murray, *Understanding Competing Theories of Negotiation*, 2 NEGOT. J. 179, 182–85 (1986) (describing how the problem-solving negotiator "[c]onsiders needs/interests/attitudes of other side as both relevant and legitimate to resolving the dispute"); Menkel-Meadow, *supra* note 8, at 795 ("the problem-solving model presents opportunities for discovering greater numbers of and better quality solutions . . . [for] meeting a greater variety of [the parties'] needs both directly and by trading off different needs, rather than forcing a zero-sum battle over a single item.").

<sup>20</sup> Menkel-Meadow, *supra* note 8, at 795–96 (describing examples of such behavior).

<sup>21</sup> Dean G. Pruitt, *Achieving Integrative Agreements*, in NEGOTIATING IN ORGANIZATIONS 35, 40–41 (Max H. Bazerman & Roy J. Lewicki eds., 1983) (describing integrative strategy of "Bridging").

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competition, secrecy, deception, and manipulation and in favor of openness, candor, generosity, respect, and kindness.<sup>22</sup> It is the opposite of the adversarial or positional bargaining that dominates modern American legal practice, or at least it says it is.<sup>23</sup>

Let us suppose for a moment that all of this is true. It would then seem fair to expect a bargaining theory of this sort to follow the same principles in all aspects of its existence, including the manner in which it engages other bargaining theories in an attempt to explain the nature of bargaining. If working jointly with others is the best way to settle legal disputes, then presumably it also is the best way to settle disagreements over bargaining theory. One would expect communitarian theory to reach out to adversarial theory, therefore, seeking to add to and build upon the best parts of the latter rather than to dismiss it out of hand. One would expect it to respect a conception of bargaining that had remained influential over several decades of bargaining practice and assume that such a view must have something to contribute to a unified theory of bargaining. One would expect it to see adversarial theory as a partner in the process of understanding and explaining bargaining generally, rather than as a competitor in a struggle for control of the bargaining theory universe. One would expect it to approach the scholarly enterprise in a collegial frame of mind, in other words, planning to supplement and refine prevailing views rather than replace them, to be one more piece in the bargaining puzzle rather than the final word.<sup>24</sup>

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<sup>22</sup> Don A. Moore, *Myopic Prediction, Self-Destructive Secrecy, and the Unexpected Benefits of Revealing Final Deadlines in Negotiation*, 94 ORG. BEH. & HUMAN DEC. PROC. 125–39 (2004) (describing the importance of negotiators revealing full and accurate information about costs, deadlines, and situational pressures); Clark Freshman, Adele Hayes, & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1–79 (describing optimal negotiator "moods"); Menkel-Meadow, *supra* note 8, at 822 ("The problem solver recognizes that he is more likely to develop solutions which meet the parties' needs by revealing his own needs or objectives.").

<sup>23</sup> Menkel-Meadow, *supra* note 11, at 104–06 (describing the differences between communitarian and adversarial bargaining).

<sup>24</sup> I do not suggest that it is necessarily unprincipled or contradictory for communitarians to fail to find good in everything. When views are indisputably wrong, presumably communitarians, just like anyone else, are free to reject them out of hand. Moreover, if the views also are dangerous, communitarians should be free to use the full complement of rhetorical techniques, communitarian and otherwise, to suppress them. My point is simply that communitarian theory's confrontation with adversarial bargaining did not and does not present such a situation. Adversarial methods have much to contribute to a unified theory of bargaining as even the *sub rosa* communitarian adoption of such methods described in this article shows.

It seems fair to ask, therefore, whether communitarian bargaining theory meets these expectations. Does it blend with adversarial bargaining, for example, to create a new hybrid alternative that is stronger than communitarian or adversarial theory standing alone? Or instead, does it challenge adversarial theory to a kind of Wild West shootout, a winner-take-all contest in which the ultimate prize is exclusive control over the world of bargaining theory? Sadly, if the attitude manifested by proponents of communitarian theory in the scholarly literature is the best evidence, the answer is all too clear. Communitarian theory has opted to be the new fast gun in town, to knock off its long-established adversarial counterpart and reconfigure the world of bargaining theory in communitarian terms.<sup>25</sup> This attitude is evident in two distinct parts of the communitarian literature. The first is its critique of adversarial bargaining and the caricatured and ungenerous description of the adversarial approach on which that critique is based. The second is its statement of the normative and empirical case for communitarian bargaining and the misleading, disingenuous, and manipulative use it makes of data to support that case. I will provide examples of each.

#### *A. The (Non) Communitarian Indictment of Adversarial Bargaining*

The communitarian indictment of adversarial bargaining is all-encompassing, rejecting the adversarial method in all of its manifestations, along with adversarial bargaining's foundational commitment to the pursuit of individual self-interest.<sup>26</sup> Communitarian theory is a total and exclusivist view. It treats the distilled lessons of decades of adversarial bargaining practice as misguided, an evolutionary frolic and detour, and speaks as if communitarian theory presents the first true description of effective legal bargaining. The earliest, most highly regarded, and enthusiastic statement of this particular view is Professor Carrie Menkel-Meadow's important mid-1980s article, *Toward Another View of Legal Negotiation: The Structure of*

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<sup>25</sup> Professor Menkel-Meadow may acknowledge this indirectly even though she does not consciously ratify it as a goal. See Menkel-Meadow, *supra* note 9, at 495 ("I sometimes wonder if [communitarian scholarship illustrating cognitive distortions in bargaining] gets in the way of using the simpler, if more positive, principles of 'principled negotiation.'") (footnote omitted).

<sup>26</sup> Communitarian commentators do not say explicitly that there is nothing good about adversarial bargaining, they simply criticize all aspects of it and fail to include any of its features in the communitarian alternative.



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*Problem Solving*.<sup>27</sup> Professor Menkel-Meadow's article was both the first systematic statement of the problem solving version of communitarian bargaining and also the first comprehensive indictment of the adversarial alternative.<sup>28</sup> To this day it remains the article upon which most subsequent criticism of adversarial bargaining is grounded. It is the Bible of communitarian bargaining and its Ninety-Five Theses as well.<sup>29</sup>

Professor Menkel-Meadow reduced all types of adversarial bargaining to a single "unidimensional conception"<sup>30</sup> characterized by parties who "want[] as much as [they] can get,"<sup>31</sup> and who "focus[] on 'maximizing victory.'"<sup>32</sup> These characteristics describe both the way adversarial bargainers think bargaining should proceed and dictate the types of behaviors they should

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<sup>27</sup> Menkel-Meadow, *supra* note 8. Menkel-Meadow's latest discussion of bargaining illustrates the extent to which communitarians have learned to express their inhospitality to adversarial methods in a more indirect manner. Now, rather than attack adversarial bargaining directly, Menkel-Meadow simply leaves it out of her description of the bargaining universe. For example, in summarizing the twenty-five year old debate between proponents of adversarial and communitarian methods she neglects to mention the work of many of the most important proponents of adversarial methods—Gary Bellow, Bea Moulton, Charles Craver, Harry Edwards, Donald Gifford, Dwight Golann, Gary Lowenthal, Cornelius Peck, Scott Peppet, Edward Sherman, and many others. See Menkel-Meadow, *supra* note 9, *passim*. James White gets mentioned, of course, this time as someone who sees "the world as dark, competitive, and brutish." *Id.* at 491 (footnote omitted). Professor White is a favorite whipping boy of communitarian commentators, perhaps because he grounds his views in actual bargaining practice rather than idealized models. See Condlin, *Bargaining With a Hugger*, *supra* note 7, at 5 n.13.

<sup>28</sup> The widely-read first edition of *Getting to Yes* by Roger Fisher and William Ury predates Professor Menkel-Meadow's work by a few years but Fisher and Ury incorporated aspects of adversarial bargaining into their theory of principled bargaining; unlike Menkel-Meadow, they did not reject it completely. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981). For a discussion of the differences between principled and problem-solving bargaining, see Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 39–41 (1992) [hereinafter Condlin, *Bargaining in the Dark*].

<sup>29</sup> Professor Menkel-Meadow may have qualified her views over the years, acknowledging now that legal dispute bargaining is different from generic problem solving. See Menkel-Meadow, *supra* note 11, at 102–03 (describing the distinctive features of legal dispute bargaining).

<sup>30</sup> Menkel-Meadow, *supra* note 8, at 767.

<sup>31</sup> *Id.* at 765.

<sup>32</sup> *Id.* at 764. I take it this means "maximizing the likelihood of being victorious." Menkel-Meadow explains that "[m]aximizing victory' involves two separate goals . . . to 'maximize the likelihood the client will prevail,' and . . . to maximize the amount the client receives upon prevailing." *Id.* at 764 n.33 (citation omitted).

use.<sup>33</sup> Adversarial bargaining, in Professor Menkel-Meadow's view, is a "stylized linear ritual of struggle," made up of "high first offers, leading to a compromise point along a linear field of pre-established 'commitment and resistance' points,"<sup>34</sup> often resulting in a "split the difference" resolution.<sup>35</sup> It proceeds by demand, threat, and bluff, and eschews reasoned analysis of substantive differences based on consensus background norms.<sup>36</sup> Adversarial bargainers outlast, intimidate, and deceive foes into making ill-advised concessions and agreements, rather than teach others something new about the issues in dispute.<sup>37</sup> Recast in terms of a popular communitarian metaphor, adversarial bargaining is a kind of pie-throwing contest in which each side throws and ducks in reverberating sequence until one or the other concedes, with the cleanest—or dirtiest, depending upon one's perspective—bargainer winning.<sup>38</sup> It is all form and no substance,<sup>39</sup> a kind of alpha male head-

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<sup>33</sup> *Id.* at 767.

<sup>34</sup> *Id.*

<sup>35</sup> Menkel-Meadow, *supra* note 8, at 770. "Linearity" is a recurring adjective in Menkel-Meadow's criticism of adversarial bargaining, though it is not exactly clear what she means by it. Perhaps she means to say that negotiation is a form of stylized dance to a middle, with both sides making concessions that converge symmetrically, though it would seem possible to do this in many patterns other than a straight line.

<sup>36</sup> Menkel-Meadow, *supra* note 8, at 769 (describing adversarial bargaining as a "ritual of offer and demand"); *id.* at 778–80 (describing the techniques of adversarial bargaining as including bullying, manipulating, deceiving, overpowering, and taking advantage of the other side); Schneider, *supra* note 7, at 163 ("The adversarial negotiator is inflexible (stubborn, assertive, demanding, firm, tough, forceful) and self-centered (headstrong, arrogant, egotistical). This negotiator likes to fight (irritating, argumentative, quarrelsome, hostile) and the method of fighting is suspect (suspicious, manipulative, evasive).").

<sup>37</sup> Menkel-Meadow, *supra* note 8, at 778 ("Adversarial negotiation processes are frequently characterized by arguments and statements rather than questions and searches for new information . . . [and by] competitive strategies designed to force the other side to capitulate.") (footnote omitted).

<sup>38</sup> Murray, *supra* note 19, at 182 (describing how the competitive negotiator "[c]hooses processes and strategies similar to military maneuvers [and] focus[es] on the process of winning, not on the resolution of disputes"); Leonard Greenhalgh, *The Case Against Winning in Negotiations*, 3 NEGOT. J. 167, 167–73 (1987) (criticizing the prevalence of win-lose approaches to negotiation).

<sup>39</sup> Interestingly, the problem-solving conception of bargaining Professor Menkel-Meadow would substitute for adversarial bargaining is a process—rather than ends—based conception as well. It just emphasizes different processes. See Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L. J. 553, 554 (2006) (describing the priority of "process pluralism" over "substantive commitments" in dispute settlement). Menkel-Meadow's substantive

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butting, the product of vestigial, atavistic impulses lingering in the gene pool from a more primitive developmental period.<sup>40</sup>

Menkel-Meadow found acceptance of this approach to be "remarkably uniform" in the legal bargaining literature,<sup>41</sup> and argued that while it might work in disputes over single issues, it is "clearly insufficient when the issues in a negotiation are many and varied."<sup>42</sup> This description is overdrawn, of course, perhaps to sharpen the contrast between adversarial bargaining and Professor Menkel-Meadow's problem solving alternative. Whatever the motive, Professor Menkel-Meadow's vision of adversarial bargaining is a straw man, and not a picture of real life bargaining. When her description is compared to more sophisticated depictions of actual bargaining,<sup>43</sup> it becomes clear that her true bogeyman is incompetent bargaining, not adversarial bargaining. To support the claim that her description is representative, she cites to a somewhat infamous *Clearinghouse Review* article on hardball negotiation tactics for legal services lawyers and an insouciant book on bargaining tips for *Playboy* readers.<sup>44</sup> Neither of these was an attempt to

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commitments are to "fairness, equality, reduction of human pain and suffering, care for all human beings, tolerance, peaceful coexistence wherever possible, and justice." *Id.* at 554 n.5. This list captures the diffusiveness of the communitarian position perfectly. It reminds one of the architect who had ten ideas and put them all in the same house. Menkel-Meadow also uses the architect metaphor to describe her lecture, but she gives it a different spin. *See id.* at 554-55.

<sup>40</sup> The idea that adversarial bargainers are insufficiently socialized brutes continues to appear in the communitarian literature. *See, e.g.,* Editors' Note, Catherine H. Tinsley, Jack J. Cambria, & Andrea Kupfer Schneider, *Reputations in Negotiation*, in *THE NEGOTIATOR'S FIELDBOOK*, *supra* note 11, at 203 (describing adversarial bargainers as having "a Formica plaque . . . [on their] desk[s that says] 'Yea, when I walk through the Valley of the Shadow of Death I shall fear no evil, for I am the meanest son of a bitch in the valley.'").

<sup>41</sup> Menkel-Meadow, *supra* note 8, at 768.

<sup>42</sup> *Id.* at 771 (footnote omitted).

<sup>43</sup> *Cf.* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *STAN. L. REV.* 497 (1991) (describing settlement negotiations in Silicon Valley securities litigation).

<sup>44</sup> *See* Menkel-Meadow, *supra* note 8, at 776 n.88 (citing MICHAEL MELTSNER & PHILIP G. SCHRAG, *PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION* 231-40 (1974); and HERB COHEN, *YOU CAN NEGOTIATE ANYTHING* (1980)). The Meltser and Schrag book excerpt was adapted from Michael Meltser & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 *CLEARINGHOUSE REV.* 259 (1973). The Cohen book was first serialized in *Playboy Magazine*. The Cohen book was more clever than mean-spirited, and the Meltser and Schrag piece was more a defensive reaction to the use of hardball tactics against legal services clients than a suggestion to legal services lawyers that they engage in pre-emptive adversarial strikes. Professors

describe a complete theory of ordinary bargaining practice, and each qualified and restricted its recommendations in numerous, situation-specific ways.<sup>45</sup> In fact, if caricatured adversarial maneuvering of the sort Professor Menkel-Meadow describes as typical dominates ordinary bargaining practice, one wonders how so many lawyers could have been induced to buy into the system. It is not in their interest and does not play to their strengths.<sup>46</sup> Perhaps Professor Menkel-Meadow's criticisms were just the exuberance of youth. She expressed them over twenty years ago and many of us were more combative then.<sup>47</sup> While she has re-affirmed some of the criticisms over the years, she also has softened them somewhat and now seems willing to make room for bargaining maneuvers and techniques she once thought inappropriate.<sup>48</sup>

Not everyone has mellowed, of course; many express the original indictment of adversarial bargaining with all the same gusto as Professor Menkel-Meadow in her early years—sometimes even more so—and the trashing of adversarial bargaining remains one of the core moves of

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Meltsner and Schrag are a particularly unlikely pair to make representatives of the adversarial case. They have devoted their entire practice and academic lives to serving the poor and underrepresented and perhaps because of this, unlike the wave of communitarian commentators, they take practical concerns into account in constructing a bargaining theory.

<sup>45</sup> Meltsner & Schrag, *Negotiating Tactics*, *supra* note 44, at 259 ("This list of tactics is not intended to endorse the propriety of every one of them."); *id.* at 260 (qualifying the tactic of outnumbering the other side in situations where it would make the person feel insecure); COHEN, *supra* note 44, at 149–58 (recommending that parties negotiate "for mutual satisfaction" and "harmonize" and "reconcile" needs); *id.* at 119–48 (describing "[w]inning at all costs" as a "Soviet Style"); *id.* at 163–205 (describing the "win-win" technique).

<sup>46</sup> To work, the style requires an intimidating presence, a bullying personality, a willingness to make demands without giving reasons, the capacity to lie to another face-to-face, and the like. Lawyers often are depicted in popular culture as bullies, blusterers, liars, and the like, but anyone who has ever taught in law school realizes that, on the whole, lawyers are remarkably ordinary, with all of the mannerisms, values, foibles, anxieties, and limitations of people generally. Some are bullies, liars, and bores to be sure, but that also is true of the population at large.

<sup>47</sup> See, e.g., Robert J. Condlin, "Tastes Great, Less Filling": *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986) (a tendentious criticism of the tacit authoritarian culture and ideology of clinical legal education).

<sup>48</sup> See Menkel-Meadow, *supra* note 39, at 555–56 (accepting the role of principled argument, preference trading, and passionate commitment in human problem solving); *id.* at 565 n.54 (acknowledging that "[c]onflicts [can be] necessary for justice").

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Alternative Dispute Resolution scholarship.<sup>49</sup> For example, John Murray describes the adversarial approach to bargaining as representing a refusal to bargain, a process of presenting "an unbreachable defensive position" which an "opponent cannot dislodge or defeat . . . by any means of persuasion based on the merits."<sup>50</sup> Adversarial bargainers "coerc[e]," "deceiv[e]," and "manipulat[e]" opponents,<sup>51</sup> choose strategies based on what will yield the biggest gain no matter the cost, ignore concerns of "fairness, wisdom, durability, and efficiency,"<sup>52</sup> and consider the "needs/interests/attitudes of opponent[s] as not legitimate . . ."<sup>53</sup> "Like a military general,"<sup>54</sup> they get excited about the prospect of achieving "victory over the opponent on the field of battle,"<sup>55</sup> and leave the task of "[r]esolving the underlying disagreements between [the] parties . . . to others . . . [so that they can] savor the . . . challenge of the negotiation chase as if it were only a game, like baseball, chess, or poker."<sup>56</sup>

Even respectful and temperate commentators sometimes join in the assault. For example, Professors Mnookin, Peppet, and Tulumello (MP&T) criticize adversarial bargaining for its hubris. In assuming they can get better than average results, say MP&T, adversarial bargainers necessarily must think they are more "skill[ful], intelligent, [and] sophisticated" than other bargainers, and that for them bargaining is just a game of "fishing for suckers."<sup>57</sup> The mistake here, of course, is the failure to recognize that

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<sup>49</sup> Even Professor Menkel-Meadow sometimes cannot resist the urge. In her recent *Chettel* lecture, where she makes inclusivist overtures to adversarial bargaining, she also caricatures the adversary approach one more time, perhaps for old time's sake. See, e.g., *id.* at 573 (describing how communitarian "processes are intended to enhance public participation, create more enlightened citizens, and produce higher quality and more variegated, creative, and tailored solutions to modern complex problems than conventional on/off decisions produced by the conventional adversary system of trial, or unprincipled compromise in its shadow.") (emphasis added).

<sup>50</sup> Murray, *supra* note 19, at 183.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 182.

<sup>54</sup> *Id.* at 183. It's not clear why Murray excludes Naval Officers from his metaphor.

<sup>55</sup> *Id.*

<sup>56</sup> Murray, *supra* note 19, at 183. Murray has chosen an odd assortment of games to illustrate his "thrill of victory" point. Lulling one to sleep, rather than beating him into submission, comes more immediately to mind when one thinks of baseball and chess, and none of the games listed is associated with the kind of trash-talking animosities commonplace in football, soccer, boxing, and other more physical sports.

<sup>57</sup> MNOOKIN, PEPPET, & TULUMELLO, *supra* note 5, at 321–22 ("[A] competitive hard bargainer will achieve a better result for a client than a problem solver—if the other

bargaining is a learning experience as much as a contest.<sup>58</sup> Not all bargainers start with a complete understanding of the issues in controversy,<sup>59</sup> or access to all of the relevant data. Not all bargainer arguments are dispositive, and not all party interests are clearly defined and rigidly held. As a consequence, even highly skilled bargainers change their minds about what cases are worth.<sup>60</sup> It is reasonable, therefore, for bargainers to assume that they will be able to teach one another something during the course of a bargaining conversation.<sup>61</sup> In fact, this is a commonplace assumption in all serious conversation about differences. Take MP&T's "conversation" with their readers about the nature of effective bargaining. In accusing adversarial bargainers of hubris, MP&T necessarily must assume that they might be able to convince others to see things their way. If so, why isn't the same explanation available to adversarial bargainers defending their expectations of better-than-average results? Helping others learn is a social act, not an arrogant one, based on trust in the others' ability to understand and grow

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side is represented by ineffective counsel so eager to settle the dispute or make a deal that he simply offers concession after concession. [P]roblem-solving . . . probably gives up some opportunities to fish for suckers [but] how you see this cost . . . will depend on how likely you believe it is that those you negotiate against will be less skilled, intelligent, or sophisticated than you are."). Other commentators agree that any attempt to bargain adversarially must be based on "the assumption that the other side can be bullied, manipulated or deceived." Menkel-Meadow, *supra* note 8, at 778; *see also* Murray, *supra* note 19, at 184–85 ("The success of [adversarial bargaining] depends largely on an inequality in the relative level of negotiator competence, which is not a solid base for generating consistently good outcomes.").

<sup>58</sup> See P. H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 82 (1979) (describing negotiation as a "cyclical process comprising the repetitive exchange of information between the parties, its assessment, and the resulting adjustments of expectations and preferences"); William P. Bottom & Paul W. Paese, *Judgment Accuracy and the Asymmetric Cost of Errors in Distributive Bargaining*, 8 GROUP DECISION & NEGOT. 349, 357 (1999) (describing how bargaining leads to an understanding of the other side's constraints).

<sup>59</sup> As Steve Goodman sang, "a mind confused is sometimes altered." STEVE GOODMAN, *Roving Cowboy, on WORDS WE CAN DANCE TO* (Red Pajama Records 1976).

<sup>60</sup> Skillful bargainers concede for other reasons as well. A client may lack adequate resources to prosecute the case, have a low tolerance for risk, or see better opportunities for gain elsewhere and, as a consequence, instruct the lawyer to settle the case on the adversary's terms.

<sup>61</sup> See Menkel-Meadow, *supra* note 39, at 574 n.87 (describing research experiments showing that "people actually do change their minds and educate each other" in deliberative discussions).

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from new information and experiences, and this is as true for adversarial bargainers as it is for MP&T.<sup>62</sup>

### B. *The Normative Case for Communitarian Bargaining*

The normative case for communitarian bargaining has many of the same adversarial properties as the communitarian critique. Rather than argue directly for the efficacy of communitarian methods based on evidence from actual bargaining practice, communitarians more often turn to anecdote, parable, and personal taste to support their claims.<sup>63</sup> When they provide empirical evidence it usually takes the form of responses to opinion surveys describing perceptions of bargaining, rather than direct data about bargaining itself.<sup>64</sup> There are many variations on this argument strategy and I will describe a few of the most common ones below.

#### 1. *Jack Sprat Hypotheticals*

The first attempts to justify communitarian bargaining were based on the assumption that it was possible to satisfy the interests of all parties to a bargaining dispute equally, that bargaining was a positive and not a zero-sum game in which party interests inevitably complemented one another.<sup>65</sup> If bargainers are sufficiently imaginative and clever, communitarians believe, brainstorming together honestly and candidly, they will discover mutually

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<sup>62</sup> "Your friends will tell you that they are sincere; your enemies are really so. Let your enemies' censure be like a bitter medicine, to be used as a means of self-knowledge." Arthur Schopenhauer, *Counsels and Maxims*, in *THE PESSIMIST'S HANDBOOK: A COLLECTION OF POPULAR ESSAYS* 738 (T. Baily Saunders trans., The University of Nebraska Press 1976) (1851).

<sup>63</sup> See, e.g., Menkel-Meadow, *supra* note 39, at 559 (describing how the experience of non-adjudicatory decisionmaking during a Legal Process course in law school was "mesmeriz[ing]" in a way that the "first-year, standard, Professor Kingsfield – *One L* experience" was not) (footnote omitted).

<sup>64</sup> Sometimes they simply report on personal experiences and ask the reader (implicitly) to take their word both for what happened, and how it should be interpreted. See, e.g., Menkel-Meadow, *supra* note 39, at 560 ("In the back of my legal services office was one woman lawyer, who, instead of bringing dramatic class action lawsuits, quietly cultivated relationships and negotiated good outcomes for her clients.").

<sup>65</sup> Menkel-Meadow, *supra* note 8, at 784–93 (describing the zero-sum assumptions of the adversarial model of bargaining); Menkel-Meadow, *supra* note 11, at 104–06 (describing the various ways in which the communal conception of bargaining objectives have been described in the literature over the years).

satisfactory solutions.<sup>66</sup> To support this claim, communitarians offer a series of what might be described as "paired in the voting" nursery-rhyme-like stories in which participant objectives dovetail rather than conflict. Dividing an orange between two people, for example, is accomplished by giving one person pulp and the other peel;<sup>67</sup> a piece of cake is shared by giving one person icing and the other cake;<sup>68</sup> and a couple who individually prefer mountains and ocean are encouraged to vacation at a mountain resort next to the seashore.<sup>69</sup> These examples seem quaint in retrospect, notwithstanding that an occasional commentator still uses them, but at the time of the communitarian ascendance they were offered in all seriousness as proof of the advantages of communitarian bargaining.<sup>70</sup> Even then it seemed a little

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<sup>66</sup> Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697, 698–99 (2004) (describing the process and benefits of "brainstorming"); Menkel-Meadow, *supra* note 11, at 105–12 (describing the role of working creatively with another negotiator in problem solving negotiation); Menkel-Meadow, *supra* note 8, at 818–22 (describing the process of "exploring and considering both parties' underlying needs and objectives" as part of a "two-sided brainstorming [session] with the other party").

<sup>67</sup> This might have worked had Samuel Johnson been involved in the negotiation. Apparently Dr. Johnson preferred peel to pulp, but for reasons that remain mysterious. Frank Kermode, *Lives of Dr. Johnson*, N.Y. REV. OF BOOKS, June 22, 2006, at 28, 30 (describing how Johnson "collected bits of orange peel from the oranges he had presumably squeezed [and] scraped and preserved the dried fragments [but] refused to tell the inquisitive Boswell why he did so, thus frustrating the biographer's legitimate passion for little 'specimens . . . of Johnson's character.'").

<sup>68</sup> Menkel-Meadow, *supra* note 8, at 771. For more on cake, see *infra* notes 93 and 147–52 and accompanying text.

<sup>69</sup> Menkel-Meadow, *supra* note 8, at 799. Dean Pruitt suggests that if the couple is fortunate enough to have four weeks of vacation they could divide it evenly, spending two weeks in the mountains and another two weeks at the seashore. Dean G. Pruitt, *Achieving Integrative Agreements*, in *NEGOTIATING IN ORGANIZATIONS* 35, 37 (Max H. Bazerman & Roy J. Lewicki eds., 1983). Menkel-Meadow finds this resolution unsatisfying because of the transaction costs involved in moving from place to place and the fact that it will leave each party unhappy half of the time. Menkel-Meadow, *supra* note 8, at 799. "Everybody happy all of the time" seems to be a credo of communitarian bargaining. It reminds one of Lewis Carroll's dodo. LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* 49 (1960) ("Everybody has won, and all must have prizes.").

<sup>70</sup> Legal scholars use the orange and cake illustrations with great facility but it takes a skilled social scientist to get both into the same data set. See, e.g., Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 AM. BEHAV. SCI. 211, 215–16 (1983) (describing "two sisters [who] agreed to split [an] orange in half, allowing one sister to use her portion for juice and the other sister to use the peel of her half for a cake," overlooking "the integrative agreement of giving one sister all the juice



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ironic that communitarians would treat nursery rhymes as empirical evidence, particularly given their critique of adversarial bargaining as lacking a firm empirical grounding,<sup>71</sup> but communitarian argument is nothing if not inconsistent and it has a difficult time separating personal taste from empirical fact.<sup>72</sup>

In addition to being self-serving, nursery rhymes do a poor job of modeling the world of actual bargaining practice. Every now and then, I suppose, one is called upon to help members of the Sprat<sup>73</sup> family settle a dispute. Here, preferences complement rather than compete with one another. But for the most part, people raised in a common culture share tastes rather than divide them, and have similar hopes and expectations for bargaining outcomes rather than opposite ones.<sup>74</sup> Disputes of any complexity usually are

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and the other sister all the peel"). So far as I can tell, no one has yet combined orange, cake, and a vacation to a mountain resort next to the seashore all in the same story. STEVE GOODMAN, *You Never Even Call Me by My Name*, on ARTISTIC HAIR (Red Pajama Records, 1983) ("we tried to put into one song, everything that had ever been in any . . . country and western song").

<sup>71</sup> Menkel-Meadow, *supra* note 8, at 766–67.

<sup>72</sup> Proponents of communitarian bargaining do not say directly that they prefer communitarian methods for reasons of personal taste, of course, but they do hint at it. *See, e.g.*, WIGGINS & LOWRY, *supra* note 15, at 55 (describing themselves as people "whose natural instincts lie away from the push and pull of aggressive tactics"); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 516, 531 (2005) (describing how some lawyers do not "relish" the standard adversarial conception of the lawyer bargaining role and would like to change it to create a work environment that is more personally compatible).

<sup>73</sup> "Jack Sprat could eat no fat, His wife could eat no lean, And so between them both, you see, They licked the platter clean." THE MOTHER GOOSE TREASURY 14 (Raymond Briggs ed., 1966). It is reassuring to know that I am not the only one old enough to remember Jack Sprat. *See* Russell Korobkin, *Aspirations, and Settlement*, 88 CORNELL L. REV. 1, 21 n.98 (2002) ("[N]egotiation between Mr. and Mrs. Spratt [sic] [would be] noncompetitive, because neither has any interest in what the other wants.") The nursery rhyme character is Jack Sprat. Jack Spratt is the protagonist in a science fiction series written by Jasper Fforde, though the latter is clearly modeled on the former. JASPER FFORDE, *THE BIG OVER EASY* (2005).

<sup>74</sup> Korobkin, *supra* note 73, at 21 n.98 ("It is a relatively rare situation in which all the issues or goods that one negotiator considers 'good,' the other considers 'bad,' thus rendering negotiation a completely noncompetitive activity."); Laura Spinney, *Why We Do What We Do*, NEW SCIENTIST, July 31, 2004, at 31, 32–35 (describing the "instinctual response to overvalue something when we see that other people want it"); *see also* Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=909518> (last visited Mar. 4, 2008) [hereinafter Relis, *Consequences*] (challenging the premise that litigants and their attorneys

not resolved by looking for something distinctive for each participant, therefore, since much of the time each participant will want more or less the

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understand litigation-track mediation in the same way and want the same things from it, using an empirical study based on medical malpractice case data); Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. (forthcoming 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909522) (last visited Mar. 4, 2008) [hereinafter Relis, *Misconceptions*] (examining "why . . . plaintiffs sue, and what . . . they seek from litigation"). In an interesting and sophisticated discussion, Professor Relis revives and refines the long-standing argument against the dispute transformation phenomenon, the process through which lawyers reframe litigant objectives into "legally cognizable compartments suitable for processing within the legal system." Relis, *Misconceptions*, *supra*, at 3. See also Menkel-Meadow, *supra* note 8, at 783 (describing how clients are intimidated by adversarial proceedings into depending on lawyers "to structure solutions that are 'legal' rather than what the client might desire if the client had free rein to determine objectives"); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25, 31 ("Lawyers are said to . . . narrow disputes by . . . translating into limited legal categories what might have been broader and more general."). Relis grounds her version of this familiar argument in interview data from lawyers and clients involved in malpractice litigation. Unfortunately, her discussion raises as many concerns as it addresses. She does not deal fully with the so-called "cultural" objection to the dispute transformation critique, for example, that litigants often describe their goals in principled terms because principle has a higher cultural status than money—or, in terms of the familiar joke Professor Relis trades on in her title, "When someone says it's not about the money, it's about the money." She also does not discuss the possibility that litigants may want non-monetary compensation—for example, apologies, admissions of error, prevention of recurrences, and acknowledgment of harm—in addition to money rather than as a substitute for it. What happens, for example, after an apology has been made and the client still has to live with the costs of the harm? See Menkel-Meadow, *supra* note 8, at 772 ("[t]he 'concession' of an apology from the other side may or may not reduce the amount of money to be negotiated as compensation for the other things."). Similarly, she does not consider the principal reason defendants do not apologize, that in doing so they make themselves vulnerable to lawsuits for money damages. See Tresa Baldas, *Physician "I'm Sorry" Bills Continue to Spread*, NAT'L L.J., April 30, 2007, at 6 (describing the growing movement among the states to ban the use of apologies in lawsuits against doctors); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1014–32 (1999) (describing benefits and costs of apologies in negotiation). Nor does she consider the extent to which some litigant demands ask, in effect, for things that can never be provided by any legal system—for example, that a loved one be brought back to life, a vital organ be restored, and the like. All efforts to satisfy such demands, legal or otherwise, are destined to be inadequate. Finally, her argument for why the legal system should be required to provide all-encompassing relief—psychic and emotional as well as monetary—that if it doesn't, "many fundamental issues within disputes will not be addressed or resolved," Relis, *Misconceptions*, *supra*, at 47, begs the question of how different types of harm should be compensated by a social system.

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same something. Even when interests are complementary, parties will want to bargain over the items in dispute, not give them away. To do this they will need to compare the value of pulp to the value of peel, for example, to know how much of one item to exchange for how much of the other. There is no *a priori* reason to suppose that these items are equally valuable or that they should be traded on a one-for-one basis. Finding a common denominator for comparing items in a dispute presents a new bargaining problem, however, and one for which there is no "pulp-peel" formula—short of hard bargaining—to resolve.

A belief in mutually exclusive bargaining outcomes, equally protective of each party's interests, is usually an expression of hope that bargaining will not be necessary more than it is a program for bargaining effectively. It is true that communitarians use Jack Sprat examples to illustrate the common-sense point that not all value systems are identical and that sometimes bargained-for items may be divided naturally to all the parties' satisfaction.<sup>75</sup> Communitarians realize that most real negotiations do not involve oranges, of course, and that pulp-peel resolutions are not literally an option most of the time. And yet, having attracted the reader's attention, they rarely provide more realistic illustrations from actual bargaining practice to demonstrate the practical force of this common-sense insight. On the rare occasions when they do provide illustrations they analyze them unconvincingly.

Professor Menkel-Meadow's discussion of the *James* case, for example, probably the most popular of the early Legal Services Corporation case files used to teach negotiation in American law schools,<sup>76</sup> illustrates this point nicely. Finding complementary interests on which to resolve the case would have required Mrs. James, the defendant in a lawsuit on a consumer loan agreement, to remain in a relationship with an automobile dealer who, over a period of several months, had been unwilling or unable—either explanation

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<sup>75</sup> Condlin, *Bargaining in the Dark*, *supra* note 28, at 44 n.122; *see also* Menkel-Meadow, *supra* note 8, at 787 n.123, 800 n.171 (describing the "Homans Principle": "[B]ecause people have different preferences or values it is possible to increase the number of outcomes in situations where several differentially valued items are at stake.") (citing G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961)). The Homans Principle can be overextended. Different parties to a negotiation may not attach the same value to each of the items in dispute, but it will be the rare case where an item valued by one person socialized in a particular culture will have no value whatsoever to another person socialized in the same culture. Even nerds like sports, just not to the same extent as jocks. If parties to a dispute value each of the items at stake to some extent, however, then each item will have to be bargained over separately. None can be traded automatically for the other.

<sup>76</sup> Menkel-Meadow, *supra* note 8, at 772–75 (citing *Valley Marine Bank v. Terry James*, in *LEGAL SERVICES CORP., OFFICE OF PROGRAM SUPPORT* (1975)).

was plausible—to provide her with a working car, causing her to lose her job, her peace of mind, and all of her discretionary, and non-discretionary, income.<sup>77</sup> Expecting Mrs. James to trust the dealer finally to get things right was wildly unrealistic given this history, and letting her reduce her interests to money, take a cash settlement, and use the cash to purchase a working car from another dealer was clearly the better course.<sup>78</sup> Yet, Professor Menkel-Meadow relegated this possibility to a single sentence, in a footnote, at the end of a three-page discussion about the importance of the parties making a go of their relationship.<sup>79</sup> Communitarians sometimes can be unilateral about the need to be bilateral.<sup>80</sup>

## 2. *Shell Games, Parables, and Fables*

In this category of communitarian normative argument, intellectual sleight of hand substitutes for analysis and evidence. Typically, a catchy story with a clever and non-obvious outcome is used to show how a seemingly intractable bargaining problem was made to give way in the face of imaginative, communal thinking, suggesting that all barriers to agreement can be overcome when bargainers stop thinking like adversaries and start thinking like colleagues. Collectively, these stories make up a set of bargaining parables that offer folksy accounts of practical bargaining wisdom. Like fairy tales, the stories all have morals intended to produce epiphanies ("Of course, why didn't I think of that?") rather than skeptical

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<sup>77</sup> *Id.*

<sup>78</sup> See HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 43 (1991) (describing cases where nonmonetary remedies are available and clients do not want them "because they do not want to have an ongoing relationship with someone who has forced them into court").

<sup>79</sup> Menkel-Meadow, *supra* note 8, at 775 n.82 (acknowledging that "[i]t is possible, of course, that the parties would prefer not to deal with each other").

<sup>80</sup> This inclination to decide, unilaterally, what is in another's best interest, whether the other recognizes it or not, can extend into areas of authority arguably delegated to clients by the Lawyer Rules of Professional Conduct. See, e.g., MNOOKIN, PEPPE & TULUMELLO, *supra* note 5, at 293 ("attorneys retain significant flexibility in defining the bounds of zealous representation [when] [t]he client's interests, conceived broadly, may be better served by a more constrained and reasoned approach to negotiation than by initiating a contest of wills or a war of attrition . . . even if the client insists upon it."); *contra* Condlin, *Bargaining in the Dark*, *supra* note 28, at 70–78 (describing division of authority between lawyers and clients in making decisions about bargaining objectives and methods).

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reflection ("Why is that so?"), and also like fairy tales, they suffer when examined closely.<sup>81</sup> I will discuss the most popular example.

In his widely read book *Getting Past No*,<sup>82</sup> William Ury retells the ancient story of the Eighteen Camels.<sup>83</sup> A father died and left seventeen camels to his three sons.<sup>84</sup> In a will, he left "half" of the camels to his eldest son, "a third" to his middle son, and "a ninth" to his youngest son.<sup>85</sup> When

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<sup>81</sup> See Erin Ryan, *Building the Emotionally Learned Negotiator*, 22 NEGOT. J. 209, 216 (2006) ("The parable model, a time-honored method of negotiation pedagogy, is strained almost to the point of overuse, leaving the sophisticated reader craving a more straightforward presentation of argument and idea.").

<sup>82</sup> For the most part I will refer to the revised, paperback edition of the book, WILLIAM URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (rev. ed. 1993) [hereinafter URY (rev. ed.)]. Professor Ury published an earlier, hardcover edition under a slightly different title, WILLIAM R. URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991) [hereinafter URY, *DIFFICULT PEOPLE*], and while the content of his argument does not change much between the two editions, his organization of the discussion does.

<sup>83</sup> URY (rev. ed.), *supra* note 82, at 159. A Google search turns up dozens, if not hundreds, of versions of this story and its popularity seems to be growing. Recently, for example, the Chaplain of the Alaska Legislature used it to open a session of the State Senate. S. Journal, 24th Leg., 2d Sess., at 2639 (Alaska, Mar. 31, 2006), available at [http://www.legis.state.ak.us/basis/get\\_single\\_journal.asp?session=24&date=20060331&beg\\_page=2639&end\\_page=2657&chamber=S&jm=2647](http://www.legis.state.ak.us/basis/get_single_journal.asp?session=24&date=20060331&beg_page=2639&end_page=2657&chamber=S&jm=2647) (last visited Mar. 4, 2008). The origins of the story are somewhat unclear. At least one person suggests that it was used, in substance if not exact form, in the *Ahmes Papyrus* to illustrate the nature of algebraic reasoning. *The Camel Problem*, <http://members.fortunecity.com/jonhays/camel.htm> (last visited Oct. 2, 2007). The Ahmes (also A'h-mosé), or Rhind Papyrus (alternately named after the scribe who copied it from a now lost Egyptian Twelfth Dynasty text, or the Scottish Antiquarian who purchased it in 1858 and donated it to the British Museum, where most of it now resides), is an ancient Egyptian mathematical text written "in hieratic (cursive) script, as opposed to the earlier hieroglyphic or pictorial script," and probably dates from the end of the Middle Kingdom (2125–1648 B.C.). ELI MAOR, *TRIGONOMETRIC DELIGHTS* 3–5 (1998). It claims to be a "complete and thorough study of all things, insight into all that exists, knowledge of all secrets." *Id.* at 5 (quoting BARTEL L. VAN DER WERDEN, *SCIENCE AWAKENING: EGYPTIAN, BABYLONIAN, AND GREEK MATHEMATICS* 16 (Arnold Dresden trans., 1961) (1954)), but it probably is more accurately described as "a collection of exercises, substantially rhetorical in form," used to train scribes and perhaps instruct students in mathematics. Don Allen, *The Ahmes Papyrus*, April 21, 2001, <http://www.math.tamu.edu/~don.allen/history/egypt/node3.html> (last visited Mar. 4, 2008); accord MAOR, *supra*, at 5.

<sup>84</sup> URY (rev. ed.), *supra* note 82, at 159.

<sup>85</sup> In the "algebra lesson" version of the story, a stranger riding a camel happens upon three young men who cannot figure out how to divide seventeen camels by the above allotments. See note 83, *supra*. The stranger realizes that the young men have the answer to their problem (17) but do not know to set up the unknown "x" so that the

the sons tried to distribute their inheritance,<sup>86</sup> however, they could not do so because seventeen is not divisible into whole numbers by two, three, and nine and the bequest was one of camels, not camel meat. Stymied, the sons had the good fortune to consult a "wise old woman," who, after thinking about the problem for a short time, said "See what happens if you take *my* camel."<sup>87</sup> With eighteen camels the distribution problem ostensibly was solved. The eldest son took his half share, which was nine, the middle son took his third share, which was six, and the youngest son took his ninth share, which was two; and because nine, six and two add up to seventeen, the sons had one camel left and were able to give it back to the wise old woman.<sup>88</sup> All then presumably lived happily ever after, basking in the warm, roseate glow of a communitarian resolution.

Professor Ury does not suggest that the lesson of this story applies literally to legal bargaining,<sup>89</sup> of course, since camels are not a common object of negotiation in the modern world, at least not in this country, and wise old women also may be in short supply. But he does suggest that the Eighteen Camels Story illustrates how communitarian thinking permits bargainers to reach agreements that at first seem impossible by encouraging them to think unconventionally, outside the "camel box" if you will, "step[ping] back from [a] negotiation, [and] look[ing] at the problem from a fresh angle . . . ."<sup>90</sup> A truly close look at the wise old woman's suggestion, however, shows that more than unconventional thinking is going on.

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arithmetic will work out. To help them, he converts their three shares into unit fractions with the least common multiple and adds the fractions together. Because the least common multiple of 2, 6, and 9 is 18 ( $2 \times 9 = 18$ ), the stranger adds  $9/18 + 6/18 + 2/18$ , to come up with the sum of  $17/18$ . The problem, stated algebraically, then reads:  $(17/18)x = 17$ , or (dividing both sides by 17),  $x/18 = 1$ , or (multiplying both sides by 18),  $x = 18$ . The stranger then realizes that "x" must be made eighteen to solve the problem, so he adds his camel to the young men's seventeen and the camels are easily apportioned. *Id.*

<sup>86</sup> The process was complicated by the fact that camels are not fungible: some are young and some old, some healthy and some sick, some strong and some weak, some large and some small, and so on and so forth. For purposes of this discussion, however, I will assume that all camels are created equal.

<sup>87</sup> URY (rev. ed.), *supra* note 82, at 159.

<sup>88</sup> *Id.* It is not clear whether they gave back the same camel or an inferior one. It is doubtful that they gave the woman a better camel, sensitive as they were to protecting their property rights.

<sup>89</sup> *Id.* at 160 (describing the camel story as illustrative of "Breakthrough Negotiation").

<sup>90</sup> *Id.* at 159.

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First, make the counterfactual assumption that live camels can be distributed in percentage as well as whole units. This assumption will be true most of the time in bargaining since most bargained-for items—for example, property, goods, money, services—are divisible into sub-units, even if camels are not.<sup>91</sup> If we divide the camels according to the fractions expressed in the father's will, therefore, the eldest son would receive 8.5 camels, the middle son 5.67 camels, and the youngest son 1.89 camels. When these numbers are compared with the distributions of nine, six and two produced by the wise old woman's suggestion we find that each son receives a slightly reduced share under the percentage system than under the wise old woman's system, but the reductions are not equal. The eldest son receives half (.50) a camel less under the percentage system than under the wise old woman's system, the middle son thirty-three hundredths (.33) of a camel less, and the youngest son eleven hundredths (.11) of a camel less. The eldest son does better under the wise old woman's system, therefore, than both the middle and youngest sons, and the middle son does better than the youngest. The wise old woman's suggestion turns out to have distributional and not just problem-solving effects, and perhaps even a political component as well ("the rich get richer"). It does not so much effectuate the father's bequest as change it, and other "neutral" communitarian bargaining techniques often have similar effects.

The problem does not end there, of course. The reader will have noticed that the 8.5, 5.67, and 1.88 camels bequeathed under the father's will add up to sixteen camels, not seventeen, and that there is one camel left over. What is to be done with it? A first response might be to divide the remaining camel by the same percentages used to divide the first sixteen and add the results to those of the earlier division. But that also would leave a camel residue so to speak, as would any subsequent such division *ad infinitum*. This residue will become very small in absolute terms, but it will never go away completely. The real problem, of course, is that the father did not bequeath his entire estate. One-half, one-third, and one-ninth do not add up to one. The principal problem raised by the camel devise, it turns out, is not how to distribute the father's bequest but what to do with unbequeathed property—should it go to the state, to charitable causes, to the father's relatives in equal shares, to pay

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<sup>91</sup> Live camels might be divisible into sub-units if one thinks of them in terms of their use rather than their person, so to speak. The sons could own the camels in common, for example, and develop a time share system for using and caring for them, so that each son would have the right to use the camels for specified periods of time, calculated on the basis of his percentage ownership interest, and the corollary obligation to pay for a percentage of the cost of the camels' room and board. This would have been a true problem-solving resolution to the sons' problem.

the expenses of the estate's administration, or left to wander aimlessly in the desert? And who should make this decision—a court, the father's personal representative, the sons, the camels, or who? The Eighteen Camels Story is based on a trick, rigged from the outset to make the obvious solution unworkable and an unconventional one necessary. In reality, the story is not about bargaining at all,<sup>92</sup> it is about estate law and what to do with unbequeathed property. Professor Ury not only ignores this question, he purports to answer it with a bargaining maneuver.

So the wise old woman missed the point; so what? Her trick was clever, presumably the sons walked away happy with the outcome, and the settlement was likely to be stable. Isn't that enough to make the story proof of the case for communitarian bargaining? How, as a rhetorical move, in other words, does the story represent a communitarian turn to the adversarial side? The answer lies in the way the story attempts to deceive a reader about what is going on in the problem and to exploit the unself-conscious tendency to pay tribute to cleverness. Professor Ury has a point to make, that bargainers should not fixate stubbornly on conventional bargaining maneuvers when out-of-the-ordinary ones—in this case, temporarily expanding the bargaining pie—might have a better chance of producing an agreement, but he seems unwilling to subject that point to critical examination. At one level of abstraction—that is, it is good for bargainers to be inventive—the point is not controversial, even adversarial bargainers would agree with it. But whether communitarian methods are more conducive to inventiveness than adversarial ones is a debatable question and needs to be examined.<sup>93</sup> Rather

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<sup>92</sup> It is an example of effective adversarial bargaining if the eldest son consciously exploited the old woman's suggestion to gain a disproportionately larger share than his brothers. Communitarians really ought to stop using this story.

<sup>93</sup> Like bile in Sigizmund Krzhizhanovsky's anti-utopian short story "Yellow Coal," base sentiments sometimes are capable of producing noble results. See Sigizmund Krzhizhanovsky, *Yellow Coal*, in SIGIZMUND KRZHIZHANOVSKY, SEVEN STORIES 184, 188 (Natasha Perova & Joanne Turnbull eds., Joanne Turnbull trans., GLAS Pub. 2006) (1991) ("My project is simple: I propose to use the energy of spite inhabiting countless individuals [to] set our factories' flywheels spinning again."). Bargainers might be more inventive defending themselves in the give-and-take of an adversarial argument, for example, than in chatting amiably in a communal conversation. No doubt, defending oneself is less comfortable than chatting amiably—though it may be more exhilarating—but comfort and inventiveness are not the same thing. Unfortunately, the Eighteen Camel Story effaces this distinction. Professor Menkel-Meadow also believes that communitarian bargainers are naturally more creative than adversarial ones and finds proof in the familiar communitarian data-point of cake. See Menkel-Meadow, *supra* note 8, at 780–82 ("The principle that one should hide information about one's real preferences is based on unexplored assumptions of human behavior that negotiators are manipulative,



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than supporting his point with evidence from actual bargaining practice, however, and leaving it to the reader to evaluate the strength of the connection between communitarian methods and inventiveness, Professor Ury pulls a camel out of a hat,<sup>94</sup> so to speak, to deflect attention from that issue and cause a reader to think it has been resolved when it hasn't. The eighteenth camel trick ignores the father's true interests, collapses a substantive law issue into one of bargaining practice, and solves a different problem than the one presented by the story—all the while pretending to show the advantages of communitarian bargaining—and that is an adversarial way to argue.

It is possible, of course, that Professor Ury just missed the unbequeathed property issue; but if he did not,<sup>95</sup> it is hard to understand why he would offer the camel story as an illustration of the effectiveness of communitarian bargaining. Perhaps he wanted to remind everyone of the heuristic value of thinking unconventionally. He emphasizes the importance of being unconventional throughout his book and sees creativity as a defining feature of his "Breakthrough" method of negotiation. Expanding the bargaining pie is a favorite communitarian maneuver, praised frequently in the literature over the years for its capacity to break impasse.<sup>96</sup> Professor Ury simply may

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competitive and adversarial. The danger of acting on such assumptions is that opportunities for better solutions may be lost (remember the chocolate cake!)" (footnotes omitted). Cake does heavy argumentative duty for communitarians.

<sup>94</sup> See Alex Stein, *A Liberal Challenge to Behavioral Economics: The Case of Probability*, N.Y.U. L. & LIBERTY (forthcoming 2008), available at <http://ssrn.com/abstract=960306> (last visited Mar. 4, 2008) (describing the traps set by Behavioral Economics experiments as "conjurer's sleight[s] of hand").

<sup>95</sup> There is no indication in Professor Ury's discussion of the story either way. He uses the story, along with two others, to summarize the benefits of "Breakthrough Negotiation" and seems to assume that the eighteenth camel maneuver solved the sons' problem. URY (rev. ed.), *supra* note 82, at 159–60 (describing everyone involved in the camel distribution problem as satisfied with the resolution). This would indicate that he did not see the issue. On the other hand, Professor Ury is a smart man and the issue is not obscure, so it is hard to believe he did not see it.

<sup>96</sup> Menkel-Meadow, *supra* note 8, at 809–10 ("By expanding resources or the materiel [sic] available for division, more of the parties' total set of needs may be satisfied. Indeed, parties come together . . . precisely because their joint action is likely to increase the wealth available to both [and] have the opportunity to help each other by looking for ways to expand what is available to them."). This maneuver also is discussed as a manifestation of the "fixed pie" bias. Max H. Bazerman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, in *NEGOTIATING IN ORGANIZATIONS*, *supra* note 69, at 51, 62–63; see also Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 *ORG. BEHAV. & HUM. DECISION PROCESSES* 98, 112 (1990) (referring to the problem as the "Fixed-Sum Error").

have called it to duty once more, this time to establish that communitarians are the most creative bargainers. If the goal was to convince readers that disagreement is never truly intractable and that there is never a reason to resort to external normative standards to resolve a bargaining problem, then the eighteenth camel trick seems proof positive of that point. But being clever is not the same as being correct and the eighteenth camel maneuver is just clever. Professor Ury is not the first to paper over a question of substantive law with a bargaining technique. Communitarians as a group have always been somewhat hostile—or at least indifferent—to the role of law in bargaining, turning to it only when all else fails, and they do not seem to feel any particular obligation to respect legal interests simply because they are legal interests.<sup>97</sup> Offering evidence one knows to be false, however, is the sort of move communitarians would be quick to condemn if used by others, and they cannot have it both ways.

### 3. *Triage (or War) Stories*

Proponents of communitarian bargaining also offer what might be described as "triage stories" to support the claim for communitarian methods but, as with the story of the eighteenth camel, the lessons from these stories often are of questionable relevance to ordinary bargaining practice, and the manner in which the stories are told frequently is anything but communitarian. Triage stories are about bargaining in its most extreme and idiosyncratic form, conducted under "battlefield" conditions, with life and death hanging in the balance and an overlay of nearly unmanageable tension distorting the decisionmaking processes. William Ury's story of the "Hostage Negotiation," also taken from *Getting Past No*,<sup>98</sup> is a popular example of the genre. Not only does this story extrapolate to bargaining generally from an exceptionally unusual bargaining event, but it does so using many of the adversarial techniques communitarians decry.

A convicted armed robber named Van Dyke, while having a cast removed at a hospital, seized a corrections officer's gun, shot the officer, and

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<sup>97</sup> Menkel-Meadow, *supra* note 8, at 826 ("[W]here the parties have widely divergent views . . . one of the primary advantages" of problem-solving "is that no judgment need be made about whose argument is right or wrong."); *id.* at 817 ("There is nothing in the problem-solving model which necessarily compels parties to consider the justice of their solutions."). Professor Menkel-Meadow's views on the role of legal rights may have evolved over the years. See, e.g., Menkel-Meadow, *supra* note 39, at 554.

<sup>98</sup> URY (rev. ed.), *supra* note 82, at 163–68.

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took several hostages while trying to escape.<sup>99</sup> During the ensuing stand-off, Van Dyke threatened to kill individual hostages seriatim until he was allowed to go free.<sup>100</sup> Over a period of nearly two days, a police negotiator named Loudon, the protagonist in the story—with the help of a newspaper reporter trusted by Van Dyke, a local television station, and a state corrections commissioner—convinced Van Dyke to surrender and release the hostages.<sup>101</sup> During the ordeal, Van Dyke and Loudon had several emotionally charged conversations about Van Dyke's reasons for trying to escape<sup>102</sup> and his conditions for agreeing to surrender.<sup>103</sup> Ultimately, Van Dyke released the hostages in exchange for press coverage of his grievances and a transfer to another (hopefully federal) prison. The fact that the police (in the person of Loudon) "shot straight with [him]" also reputedly contributed to his decision.<sup>104</sup>

The negotiation was successful, according to Professor Ury, because Loudon convinced Van Dyke that he could be trusted.<sup>105</sup> Five features of his behavior allegedly made this possible.<sup>106</sup> First, he controlled his emotions and remained focused on his own objectives rather than Van Dyke's erratic behavior.<sup>107</sup> Ury calls this "Go[ing] to the Balcony."<sup>108</sup> Second, he acknowledged the legitimacy of Van Dyke's points and agreed with them whenever possible.<sup>109</sup> Ury calls this "Stepping to Their Side."<sup>110</sup> Third, he reframed Van Dyke's demands rather than rejected them and turned them into

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<sup>99</sup> *Id.* at 163–64.

<sup>100</sup> *Id.* at 164.

<sup>101</sup> *Id.* at 164–67.

<sup>102</sup> Van Dyke listed corruption and abuse in the state prison system, his exceptionally long sentence for armed robbery, a newspaper report that he informed on fellow inmates and guards (he admitted to informing on guards, but not inmates), and his fear that he would be killed if he was returned to state prison, as his reasons for trying to escape. *Id.* at 165–67.

<sup>103</sup> *Id.*

<sup>104</sup> URY (rev. ed.), *supra* note 82, at 168. Van Dyke was taken to a federal detention center upon surrendering, but it is not clear whether he was transferred permanently to a federal prison. *See id.* at 167–68 (correction officials would "try to arrange a transfer"); *id.* at 168 (remarking that Van Dyke won only "a public promise" to be transferred).

<sup>105</sup> URY (rev. ed.), *supra* note 82, at 168.

<sup>106</sup> *Id.* at 169–71.

<sup>107</sup> *Id.* at 164.

<sup>108</sup> *Id.* at 169.

<sup>109</sup> *Id.* at 164–68.

<sup>110</sup> *Id.* at 169.

problem solving questions about the parties' mutual interest.<sup>111</sup> Ury calls this "Chang[ing] the Game [by] Chang[ing] the Frame."<sup>112</sup> Fourth, he "[h]elp[ed] Van Dyke] save face and make the outcome appear a victory" by involving him in the process of fashioning a resolution.<sup>113</sup> Ury calls this "Build[ing] [a] Golden Bridge."<sup>114</sup> And finally, he used "power . . . to [bring Van Dyke] to his senses, not his knees,"<sup>115</sup> making it "hard for [him] to say no" by "educat[ing him] about the costs of not agreeing," "warn[ing]" him rather than "threaten[ing]" him, and assuring him that the goal was "mutual satisfaction, not victory."<sup>116</sup> These might have been the reasons Van Dyke surrendered, but there is a simpler explanation that does not rely on platitudinous neologisms or self-serving factual conclusions that seems to make more sense.

To start with, Loudon may have "prevented" something that was never going to happen. Van Dyke was convicted of armed robbery, not murder, and he may not have planned, or been able, to kill any of the hostages under any circumstances. During the time he held the hostages he did not do anything to corroborate the threat to kill them—for example, shoot someone non-fatally—and the threat itself was an almost automatic move for a person in his situation. It was his only source of leverage. Without some indication that he was capable of cold-blooded murder, however, one would have expected the threat to be empty, and it was. Van Dyke may have surrendered because he was exhausted by the ordeal and did not have the stamina to continue or the will to carry out his threat. Unlike Loudon, he was on his own and could not take a break from the negotiation for even a short time. Someone had to watch the hostages. Adrenalin and drugs do not work forever, and it was only a matter of time before he would become non-functional. Loudon no doubt knew this and simply waited until Van Dyke gave out, talking him through darker moments of the process as needed. "Protractor Negotiation"<sup>117</sup> might be a better description of Loudon's style than "Breakthrough Negotiation."

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<sup>111</sup> URY (rev. ed.), *supra* note 82, at 164.

<sup>112</sup> *Id.* at 78.

<sup>113</sup> *Id.* at 170.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 168.

<sup>116</sup> *Id.* at 170.

<sup>117</sup> I take the name from Bruce Bromley's controversial description of his approach to litigation. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 56 (1994) (quoting a *Time* magazine story describing Bruce Bromley, a Cravath, Swaine & Moore partner, as boasting to a group of Stanford law students in 1978, "I was born, I think, to be a

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While Van Dyke reputedly explained his decision to surrender as prompted, in part, by Loudon's willingness to "sh[o]t straight with [him],"<sup>118</sup> it is unlikely that a prison inmate of any sophistication would see a police hostage negotiator as his friend, or would believe that state correction officials would forget about a hostage-taking incident once the crisis was over. The suggestion that Van Dyke thought this way seems a little Panglossian. This was not the only hostage-taking in recorded history, particularly in New York where the story was set, and prison inmates presumably have a great deal of direct data from which to predict an official response to such an event. They would have seen it all play out before. Surely Van Dyke knew he had no leverage once the last hostage was freed, and he must have bargained from that perspective. The most sensible explanation for his decision to surrender, therefore, may be the most obvious one. After Loudon and the state corrections department provided press coverage for his grievances and agreed to transfer him to a less dangerous prison, Van Dyke had achieved all he could hope for in taking the hostages and had everything to gain by giving up. If Loudon and the corrections department kept their promise and didn't punish him additionally for his attempt to escape—which was unlikely—he had made a pretty good deal<sup>119</sup> and that, coupled with the fact that he did not have the strength to continue, would explain his decision to surrender. The cute "Going to the Balcony" neologisms add nothing to this explanation. Van Dyke probably settled for the reason most people settle; he got what he wanted and all he could expect. Professor Ury's story is an account of a simple quid pro quo exchange, and calling it "Breakthrough Negotiation" is a little over the top.

Assuming that the Hostage Negotiation is the story of a bilateral deal, what are we to make of Professor Ury's use of it as evidence for the communitarian way of bargaining? The first thing one notices is that Loudon's bargaining style is an odd one for a communitarian to recommend. Loudon lied, dissembled, manipulated, threatened, and may even have reneged on his promise to transfer Van Dyke to a federal prison, all in a

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protractor. I could take the simplest antitrust case and protract for the defense almost to infinity. [One case] lasted 14 years. We won that case, and, as you know, my firm's meter was running all the time—every month for 14 years."). When he first announced it, Bromley probably thought that the "protractor" characterization was funny and savvy, but changing attitudes toward delay in the legal system may now make that view seem obtuse.

<sup>118</sup> URY (rev. ed.), *supra* note 82, at 168.

<sup>119</sup> Van Dyke says as much, explaining to his cousin, a corrections officer who had been brought to the scene, that he was "thinking of surrendering [because] they offered [him] a good deal." *Id.* at 167.

fashion worthy of the communitarian caricature of adversarial bargaining. Even when he expressed respect for Van Dyke, he did so for strategic reasons and not because he believed what Van Dyke said.<sup>120</sup> He did all of this, no doubt, because failing to use every trick and device at his disposal when lives hung in the balance would have been unduly squeamish. But this is why battlefield stories usually do not have much to contribute to bargaining theory.<sup>121</sup> Most legal bargaining does not involve issues of life and death, is not conducted in public or under intense political pressure for a quick and favorable outcome, does not operate in a compressed time frame in which decisions must be made on the spur of the moment without the opportunity for extensive investigation or deliberation, and is subject to normative constraints—for example, do not lie, cheat, or steal—that have less force when life and death is at stake. Triage negotiation is not ordinary negotiation in any sense of the term, in other words, and because of this it has little to teach ordinary negotiation. Arguing that it does asks a reader to draw a conclusion based on false evidence.

Professor Ury also ducks the most interesting question raised by the hostage negotiation story, that of whether there are any limits on the leverage available to the communitarian bargainer. For example, is threatening an adversary a legitimate communitarian technique? Was it acceptable for Loudon to threaten Van Dyke to extract concessions and force a favorable settlement? Threatening is based on power, not entitlement or joint interest, and doing it seems antithetical to the qualities of candor, respectfulness, and honesty, supposedly characteristic of communitarian bargaining.<sup>122</sup> Loudon's use of a threat was acceptable, according to Professor Ury, because it brought Van Dyke "to his senses, not his knees,"<sup>123</sup> but if bringing him to his senses

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<sup>120</sup> *Id.* at 164–65 (describing how each of Loudon's actions was motivated by a strategic judgment of what it would take to control Van Dyke).

<sup>121</sup> Bradley Wendel describes the deduction of a general principle from a fanciful case as the resort to the "shopworn trope" of the "ticking-bomb hypothetical." W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 121–22 (2005). Henry Shue has the classic critique. See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 142–43 (1978).

<sup>122</sup> Professor Ury describes the "theme" running throughout the strategy of Breakthrough Negotiation as "treat[ing] your opponent with respect—not as an object to be pushed, but as a person to be persuaded." URY (rev. ed.), *supra* note 82, at 160. Echoing the *meta* move at the heart of the communitarian argument, he advises a bargainer not to change an opponent's mind by direct pressure, but instead, to "change the environment in which [he] makes decisions." *Id.*

<sup>123</sup> *Id.* at 168. The difference between "senses" and "knees," as metaphors, is not self-evident. I gather Ury is saying that Loudon used just enough force to win the

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had not worked—that is, he did not surrender—would bringing him to his knees have been the next communitarian step? In answering such questions, communitarians usually turn to suspect distinctions that permit the behavior in question but call it something else. The distinction between warning and threat, for example, repeated mantra-like over the years by communitarian writers,<sup>124</sup> and defended by Professor Ury,<sup>125</sup> is the most popular of these distinctions, but it is a distinction still in search of its first coherent publicist.

Functionally, a warning is identical to a threat. Each works by causing a person to compare the costs of two harms—the one predicted by the warning or threat and the one caused by the relinquishment of one's demand—and decide which of the two is more acceptable. Neither warning nor threatening makes a claim about legal, moral, or political rights, and neither is appropriate social behavior, at least under ordinary circumstances. Each seeks to manipulate and control rather than inform and instruct. The only difference between the two is the language in which each is expressed;<sup>126</sup> and yet for communitarian bargainers, warning is acceptable and threatening is not. Perhaps the distinction is empirical, not analytical, based on the judgment that a warning is thought to be less offensive than a threat. If so, someone should write up the survey.<sup>127</sup> There may be no need, however,

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negotiation and did not punish Van Dyke gratuitously. While this may establish that communitarians are not sadists, how much more than that it establishes is not clear.

<sup>124</sup> See, e.g., FISHER & URY, *supra* note 28, at 142–43. Julie Macfarlane describes the almost phobic reaction of a communitarian lawyer to a client's questioning of the "warning-threat" distinction. The client told Macfarlane that when she, the client, characterized one of her husband's statements during a divorce negotiation as:

[A] threat, both lawyers jumped at me and said, "Oh, no, no, no, you mustn't see it as a threat." Oh, yeah, you're not supposed to—I was immediately jumped on by both lawyers for even using that word—but this is the ultimate reality because it was a threat. I mean, it was clear that . . . he was trying to bully me into—agreeing to something that I didn't want to do.

JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 34 (2005), *available at* <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf> (last visited Mar. 4, 2008).

<sup>125</sup> URY (rev. ed.), *supra* note 82, at 136–38.

<sup>126</sup> In most dictionaries, each term is defined in terms of the other. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1228 (10th ed. 1996) ("threaten . . . to give signs or warning of"); THE AMERICAN HERITAGE DICTIONARY 1363 (2d College ed. 1985) ("warning . . . An intimation, threat, or sign of impending danger").

<sup>127</sup> Professor Ury suggests that:

since communitarians could simply reverse the terms and approve of threats but not warnings, if it turned out that public sentiment ran the other way.

The problem with the distinction is the distinction itself, and not with the ordering of the two concepts. It is the proverbial distinction without a difference. Communitarians make it, I assume, because they recognize that there are times in bargaining when something stronger than reasoned argumentation is needed. Some people do the right thing not because it is right, but because not doing it would cost them more than doing it, and dealing effectively with such people requires something more powerful than a well-formed syllogism. The warning/threat distinction is simply a fig leaf for concealing the fact that communitarians sometimes want to have it both ways—free to use power when nothing else will work because consequences matter, but also free to deny that they ever resort to pure power, because image also counts.<sup>128</sup>

#### 4. *Misappropriated Mathematics*

In keeping with legal intellectual fashion of the last century, communitarian bargaining theory also has a "scientistic" side.<sup>129</sup>

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A threat is an announcement of [an] intention to inflict pain, injury, or punishment on the other side [while a] warning . . . is an advance notice of danger. A threat comes across as what *you will do* . . . if they do not agree. A warning comes across as *what will happen* if agreement is not reached. [A] threat is confrontational, a warning is delivered with respect [and t]he more dire the warning, the more respect you need to show.

URY (rev. ed.), *supra* note 82, at 137. As long as we have crossed into the realm of the linguistically fanciful, why not: "A threat is a soup that eats like a meal."

<sup>128</sup> There are many other such distinctions in the communitarian literature. Equally disingenuous is the one between "position," which is bad because it is a feature of adversarial bargaining, and "illustrative suggestion that generously takes care of your interest[s]," which is good because it is a feature of communitarian bargaining. See FISHER & URY, *supra* note 28, at 55.

<sup>129</sup> See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1046 (10th ed. 1996) (defining scientism as "an exaggerated trust in the efficacy of the methods of natural science applied to all areas of investigation"). The legal academy's interest in being scientific is a subset of its interest in being inter-disciplinary and is traceable, in part, to a long-standing insecurity over law's place in the University. Episodes in this history, some of which continue to the present, include "sociological jurisprudence" in the early twentieth century, the law and psychiatry movement in the 1950s, the critical legal studies movement in the 1960s, the law and social sciences movement in the 1970s, the law and economics movement in the 1980s to the present, and perhaps a burgeoning law and neuroscience/law and biological sciences movement at the present. Carrie Menkel-



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Communitarians borrow from game theory's collection of "fair division" algorithms, for example, to defend not so much a full-blown theory of bargaining practice as much as a set of techniques for resolving certain recurring bargaining problems. The most well-known example of this borrowing involves the redoubtable "one cuts and the other chooses" (OC<sup>2</sup>) fair-division algorithm, the oldest and most extensively studied of the mathematical procedures for producing so-called "envy-free division."<sup>130</sup> OC<sup>2</sup> may look like a bit of folkloric wisdom more than a mathematical algorithm,<sup>131</sup> but it is both, and the so-called fair-division problem<sup>132</sup> it seeks

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Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During, and After "The Law,"* 60 VAND. L. REV. 555, 560–87 (2007) (discussing various interdisciplinary movements in history of legal education). For the best discussion of the psychic forces behind law's long-felt need to prove itself to the academy, see Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645–46 (1968). Not everyone is a supporter of inter-disciplinary education. See, e.g., Anthony D'Amato, *The Interdisciplinary Turn in Legal Education*, at 5 (Northwestern University School of Law, Public Law and Legal Theory Series No. 06-32), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952483](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952483) (last visited Mar. 4, 2008) (arguing that "we have no rational basis for expecting any discipline to contribute a problem-solving idea, or any useful idea at all, to another discipline."). Allegedly, it is no longer possible to get an academic appointment at a "top" law school without being an inter-disciplinarian. Einer Elhauge, *The Death of Doctrinalism and its Implications for the Entry-Level Job Market at Law Schools*, THE VOLOKH CONSPIRACY (May 23, 2007) <http://www.volokh.com/posts/1179757913.shtml> (last visited Mar. 4, 2008).

<sup>130</sup> "[A]n *envy-free division* is one in which every person thinks he or she received the largest or most valuable portion of something—based on his or her own valuation—and hence does not envy anyone else." STEVEN J. BRAMS & ALAN D. TAYLOR, *FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION* 2 (1996) [hereinafter BRAMS & TAYLOR, *FAIR DIVISION*]; see also BRAMS & TAYLOR, *WIN-WIN*, *supra* note 4, at 13–14. The concept has been used in mathematics for almost fifty years and in economics for almost forty. BRAMS & TAYLOR, *FAIR DIVISION*, *supra*, at 2.

<sup>131</sup> One suspects that many of the people using the algorithm to defend communitarian bargaining don't think of it in mathematical terms either.

<sup>132</sup> See Lowry's retelling of Aesop's fable about The Ass, the Fox, and the Lion as a fair-division problem:

It seems that a lion, a fox, and an ass participated in a joint hunt. On request, the ass divides the kill into three equal shares and invites the others to choose. Enraged, the lion eats the ass, then asks the fox to make the division. The fox piles all the kill into one great heap except for one tiny morsel. Delighted at this division, the lion asks, "Who has taught you, my very excellent fellow, the art of division?" to which the fox replies, "I learnt it from the Ass, by witnessing his fate."

S. TODD LOWRY, *THE ARCHAEOLOGY OF ECONOMIC IDEAS: THE CLASSICAL GREEK TRADITION* 130 (1987) (footnote omitted).

to resolve is a prototypical ancient<sup>133</sup> and modern bargaining problem.<sup>134</sup> Mathematicians, like moral and political philosophers, have long been intrigued by the difficulty of dividing goods—for example, land, personal property—and rights—for example, to vote—fairly among multiple claimants, as well as the imbedded difficulty of defining the concept of "fairness" at the basis of such divisions.<sup>135</sup> Others have worked on the problem, of course—the Bible and Talmud contain several well-known fair-division procedures<sup>136</sup>—but for the most part these attempts are grounded in ideologies that are not compelling to everyone. Mathematics seeks to transcend personal views of fairness and construct standards acceptable to all.<sup>137</sup>

The modern effort to develop fair division algorithms dates principally to World War II and the work of Polish mathematician Hugo Steinhaus and his colleagues Bronislaw Knaster and Stefan Banach.<sup>138</sup> Starting with the

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<sup>133</sup> The procedure goes back at least five thousand years to the Hebrew Bible and the story of Abraham and Lot in the book of Genesis. BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 53. At first glance, King Solomon's need to determine which of two women was a baby's biological mother might seem to present a fair division problem, but the King's threat to cut the baby in half used a "division" technique as a lie detector rather than a fair distribution algorithm. *Id.* at 8. The algorithm also appears in Hesiod's *Theogony* where Zeus and Prometheus divide a portion of meat by having Prometheus place the meat in two piles and Zeus select one of the piles—though Prometheus used the technique to fool Zeus and his intentions were self-interested more than fair. See HESIOD, THEOGONY, WORKS AND DAYS, SHIELD 24–25 (Apostolos N. Athanassakis trans., 2d ed. 2004). One gets the sense that similar procedures were in use on regular basis in caves long before that, although perhaps not in the Paleolithic period. See R. DALE GUTHRIE, THE NATURE OF PALEOLITHIC ART 34–36 (2005) (arguing that Paleolithic people lived mostly in open air camps because bears hibernated in caves and made them unsafe for humans).

<sup>134</sup> Neal Stephenson used a somewhat unusual version of a fair division algorithm in his popular science fiction adventure *Cryptonomicon*, when he had a family divide a grandmother's possessions by physically placing them in appropriate positions in an empty parking lot representing the two-dimensional space of monetary and emotional values. NEAL STEPHENSON, *CRYPTONOMICON* 623–33 (1999).

<sup>135</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 130, at 1 (describing how philosophers, economists, mathematicians, political scientists, sociologists, and psychologists have studied the "old as the hills" problem of fair division).

<sup>136</sup> See H. PEYTON YOUNG, EQUITY: IN THEORY AND PRACTICE 64–80 (1994); BRAMS & TAYLOR, FAIR DIVISION, *supra* note 130, at 6–8 (describing fair division problems discussed in the Hebrew Bible and Talmud).

<sup>137</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 130, at 1.

<sup>138</sup> *Id.* at 30; See also Jack M. Robertson & William A. Webb, *Extensions of Cut-and-Choose Fair Division*, 52 ELEMENTE DER MATHEMATIK 23 (1997); Francis E. Su et

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requirement of proportionality (the ability of each player to gain half the value of divided goods no matter what other players do),<sup>139</sup> the mathematical conception of fairness has gradually moved closer to philosophical conceptions by incorporating notions of envy-freeness (each player thinks he is as well off with his announced allocation of goods as he would be with his opponents' announced allocation),<sup>140</sup> equity or equitability (each player thinks the value of what he receives is equal to the value of what his opponent receives),<sup>141</sup> truthfulness (each player announces his valuation of the bargained-for goods truthfully),<sup>142</sup> and efficiency (each player receives the particular goods he values more than any other player, and no other division of goods will make one player better off and other players no worse off), within increasingly refined algorithmic formulations.<sup>143</sup> Those refinements also have accommodated the complexities introduced by multiple parties (n-party games, division by auction, division by election),<sup>144</sup> player manipulation of announced values, and the difficulties involved in applying the algorithms to real life negotiation (distributing estate property, dividing land parcels for zoning, configuring legislative districts for voting, and the like),<sup>145</sup> so that the mathematical literature on fair division is now rich and voluminous.<sup>146</sup>

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al., *Envy-free Cake Division*, MUDD MATH FUN FACTS, <http://www.math.hmc.edu/funfacts/ffiles/30001.4-8.shtml> (last visited Aug. 28, 2007).

<sup>139</sup> BRAMS & TAYLOR, *FAIR DIVISION*, *supra* note 130, at 9.

<sup>140</sup> *Id.* at 71.

<sup>141</sup> *Id.* "Equitability" differs from "envy-freeness" in the sense that the latter involves a comparison of the divided goods based on a player's own internal evaluation and the former involves an external or interpersonal comparison of the value of the divided goods. *Id.* See also BRAMS & TAYLOR, *WIN-WIN*, *supra* note 4, at 14–15 (describing the quality of "equitability"). It also is possible for a division to be "egalitarian equivalent," that is, equitable even though the parties do not receive perfectly equal allocations. BRAMS & TAYLOR, *FAIR DIVISION*, *supra* note 130, at 71.

<sup>142</sup> *Id.* at 72–73, 76–77.

<sup>143</sup> *Id.* at 2 n.2, 44, 62. It has proved difficult to devise a procedure combining all of these properties. *Id.* at 48. Trade-offs seemingly are inevitable.

<sup>144</sup> BRAMS & TAYLOR, *WIN-WIN*, *supra* note 4, at 62–66.

<sup>145</sup> BRAMS & TAYLOR, *FAIR DIVISION*, *supra* note 130, at 115–26, 178–98, 204–28.

<sup>146</sup> *Id.* at 30–47 (describing the Steinhaus-Kuhn lone-divider procedure, the Banach-Knaster last-diminisher procedure, the Dubins-Spanier moving-knife procedure, the Fink lone-chooser procedure, the Woodall and Austin extensions of the Fink procedure); *id.* at 68–75 (describing the Brams-Taylor Adjusted-Winner procedure); *id.* at 75–78 (describing the Brams-Taylor Proportional-Allocation procedure); *id.* at 78–80 (describing the Brams-Taylor combined Adjusted-Winner and Proportional-Allocation procedure).

The operation of the OC<sup>2</sup> algorithm usually is illustrated with a story about two children dividing a piece of cake.<sup>147</sup> In the story's simplest form, the children are told that one of them will be permitted to cut the cake and the other will be permitted to choose the first piece. This division of labor is supposed to induce the first child to cut the cake into pieces of equal value—which usually, but not always, means equal size—so that he will be left with a piece equivalent to that of the second child, and the distribution of the cake will be stable.<sup>148</sup> However, it is difficult to cut a piece of cake into equal or equally valuable halves, either because the properties of the cake are not distributed evenly throughout the piece,<sup>149</sup> the halfway point is difficult to identify,<sup>150</sup> or it is hard to make an even cut.<sup>151</sup> Thus, it quickly becomes apparent to anyone using this procedure that it is better to choose than to cut.<sup>152</sup> Choosing provides an opportunity to obtain the more valuable piece in a way that cutting does not. There are ways in which the cutter can make the choice difficult—for example, cut the cake so that the piece with the most frosting or filling is smaller—particularly if he has access to the chooser's value preferences (e.g., put the cherry or nuts which the chooser is known to

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<sup>147</sup> There are several other versions of the story. For a collection, see BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 1–9.

<sup>148</sup> The algorithm does not consider who would value the cake more, who is in greater need of a piece of cake, who contributed more to making it, or other such "philosophical" concerns in its calculation of fair distribution. Cake may be associated with des(s)ert in other aspects of life but not in mathematics.

<sup>149</sup> BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 54 (describing the difference between homogeneous and heterogeneous goods).

<sup>150</sup> This would be the case if the cake was shaped as a fractal. The complexity of the stakes and the difficulty of dividing whole collections of items make the OC<sup>2</sup> procedure ill-suited to much modern negotiation. BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 66–67.

<sup>151</sup> See BRAMS & TAYLOR, FAIR DIVISION, *supra* note 130 at 41–42; see also J. KEITH MURNIGHAN, THE DYNAMICS OF BARGAINING GAMES 103 (1991). The differences produced by these problems will be small when the bargained-for good is a piece of cake, but they can be more substantial when real life goods are substituted.

<sup>152</sup> Brams and Taylor describe some of the ways pieces of cake can differ, including those that depend upon differences in the cake's type. BRAMS & TAYLOR, FAIR DIVISION, *supra* note 130, at 8. In a tacit acknowledgment that use of the algorithm does not inevitably equalize the parties' positions, there is a subcategory of research devoted to maximizing individual returns when using the procedure. *Id.* at 22–29; BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 55–58 (describing maximizing strategies for using the cut-choose procedure). Dissatisfaction with the consequences of its strategic use is one of the reasons the OC<sup>2</sup> procedure has lost favor with modern game theorists. BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 66–67.

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prefer on a smaller piece), but everything else equal, it is better to choose than to cut. The real bargaining in using the procedure, therefore, is over who will cut and who will choose, and there is no algorithm for resolving that problem. Like many communitarian bargaining techniques, the cut-choose algorithm relocates the bargaining problem, and sometimes makes it easier, but does not solve it.

There are more fundamental difficulties with using a mathematical procedure to solve real-life bargaining problems, however, even if the procedure "works" in some technical sense of that term. A fair division algorithm ignores the role of legal rights in shaping the content of a negotiated agreement, for example, and assumes that bargainers are free to choose the standards by which their disputes will be resolved, but this condition rarely exists in real-life bargaining. Parties may be free to construct their own standards for resolving disputes in a state of nature, but disputes arising in a state governed by law and regulated by legal institutions must take legal rules into account.<sup>153</sup>

While mathematical conceptions of fairness have become considerably more sophisticated over the years, they do not yet incorporate all of the cultural, moral, political, and legal norms that govern even the most rudimentary bargaining interaction.<sup>154</sup> An algorithm works like a bug spray. It solves a problem in a single bold stroke by isolating and neutralizing a mechanism at the root of the problem. It is a total solution and does not tolerate contingent, qualified, or partial resolutions of the sort inevitably necessary in many real-life disputes. A resort to mathematical procedures is stymied by the fact that the social universe is different from the noumenal universe. Social data often reacts to attempts to manipulate it by changing its form and content—it is not static or driven by mechanisms that can be turned on or off with a single switch.<sup>155</sup> Resolving a social dispute requires constant

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<sup>153</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 130, at 7–8; BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at ix (explaining that mathematical procedures are not helpful in "arguing the merits of an out-of-court settlement" of a lawsuit).

<sup>154</sup> See *supra* note 146 for examples of the increasing sophistication of mathematical conceptions of fairness.

<sup>155</sup> In the social sciences the propensity of research subjects to change their behavior in response to being studied is described as the Hawthorne Effect. This concept is both widely accepted and widely disputed. The classic study claiming to identify the Effect is Fritz J. Roethlisberger & William J. Dickson, *Management and the Worker: An Account of a Research Program Conducted by the Western Electric Company*, Hawthorne Works, Chicago (1939). On the other hand, Wikipedia reports that Richard Nisbett once called the Effect a "glorified anecdote," and remarked that, "Once you've got the anecdote, you can throw away the data." Wikipedia, *Hawthorne Effect*,

monitoring, more than a single bold stroke. Moreover, a socially constructed concept such as fairness cannot be reduced to a single, timeless procedure acceptable to all. Issues of fairness are not finally and fully resolved; debate about them simply reaches temporary resting points.

For mathematicians, the interest in fair division algorithms comes, in major part, from the desire to eliminate envy<sup>156</sup> and haggling<sup>157</sup> from the bargaining process. Envy, it is assumed, makes bargaining outcomes unstable, and haggling makes bargaining conversations unpleasant. While advancing admirable goals, this effort is likely to flounder in the socially messy world of actual dispute bargaining. Envy is the perception of unfairness rather than unfairness itself, and bargainers alone control the question of how well they think they did in comparison with their adversaries. All the "objective" evidence in the world will not convince someone he has had the better of an exchange if he thinks, rightly or wrongly, that he was entitled to more, and someone who has been fooled into thinking he won big when he did not will not envy his adversary, even if he should. Fair division algorithms do not change these perceptions.

The attempt to eliminate haggling faces similar difficulties. Haggling permits bargainers to learn about, adjust to, and accommodate the interests of other bargainers. It permits them to change minds, weaken convictions, make trades, call attention to facts not fully considered, revive considerations dismissed prematurely, and express the nature of their interests and the intensity of their resolve.<sup>158</sup> For the most part, mathematical procedures assume that these factors are static and that bargainer positions, once announced, do not change. Bargaining is a live conversation, however, in which the cultural, social, political, moral, and aesthetic forces that define the parties' interests and values—along with the institutional and social contexts in which the disputes arise—combine and recombine to shape the way bargainer beliefs and attitudes grow, change, weaken, and adapt, sometimes on a moment-to-moment basis. Only communitarians think that bargaining

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[http://en.wikipedia.org/wiki/Hawthorne\\_effect](http://en.wikipedia.org/wiki/Hawthorne_effect) (last visited Mar. 4, 2008). Apocraphyl or not, many social scientists would find Nisbett's comment congenial and dispute the magnitude, if not the existence, of the Effect. It does not matter to my discussion that the Effect may be less widespread than is often claimed, however, as long as it can and sometimes does occur. Most social scientists concede that much.

<sup>156</sup> BRAMS & TAYLOR, *FAIR DIVISION*, *supra* note 130, at 4 ("A *leitmotif* of this book is the search for procedures that quench the flames of envy.").

<sup>157</sup> *Id.* at 67 (describing the benefit of their Adjusted Winner procedure as "obviate[ing] the need for . . . haggling").

<sup>158</sup> *See Id.* at 84 (containing a good example of this process in operation).

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positions, once taken, are never modified, and they attribute this view to adversarial bargainers.<sup>159</sup> The forces released by haggling also help defuse the anger and tension inherent in bargaining and permit the sublimation of conflict necessary to a lasting resolution of a dispute. It is no more possible to remove haggling from bargaining than reasoning from judgment. Communitarians would be better off joining the effort to improve haggling, by making it substantive and rational, rather than trying quixotically to eliminate it.

Dispute bargaining is not a crossword puzzle or an Easter egg hunt with a single, predetermined solution waiting to be discovered. It is a protean political and social event whose eventual form and outcome is determined by yet-to-be-chosen actions of the parties and normative standards—legal, moral, and social—that influence how those choices will be made, and any attempt to understand and influence its operation must approach it in this light. Bargainers must believe that their interests and rights have been understood and protected, that they have been respected as persons, and that the terms of their agreements are fair<sup>160</sup> before they will give up their demands and agree to settle. Fair division algorithms do not help in determining when most of these concerns have been satisfied. Communitarians use algorithms without acknowledging their history or understanding the kinds of problems they were designed to solve, and fail to include the caveats on use that mathematicians are careful to add. In other words, they appropriate a mathematical procedure, strip it from its context, ignore its limits, and argue (implicitly) that only a dullard could fail to appreciate its (communitarian) implications. This is adversarial argument.<sup>161</sup>

### 5. *Neologism as High Theory*

Some communitarian commentators replace received concepts and terminology of traditional bargaining theory with concepts and terms of their own and then offer up the changes as new theory. This particular form of

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<sup>159</sup> See Schneider, *supra* note 7, at 178 (describing positional bargaining as making "take it or leave it" demands).

<sup>160</sup> See Korobkin, *supra* note 73, at 17 (describing empirical evidence suggesting that bargainers want the outcomes of their negotiations to be fair).

<sup>161</sup> If one treats OC<sup>2</sup> (and other such algorithms) as simply a piece of homespun wisdom for dividing power in bargaining relationships, one has a different kind of problem. Cut-choose opportunities occur infrequently in legal bargaining, and when they do, dividing authority according to the algorithm does not so much solve the bargaining problem as relocate it (to the question of who cuts and who chooses).

"nominalism about realism," to reverse Arthur Leff's classic phrase,<sup>162</sup> appears most prominently in the communitarian adaptation of the Prospect Theory of Daniel Kahneman and Amos Tversky.<sup>163</sup> Long before they learned of Prospect Theory, communitarians were natural disciples. It is an article of faith with communitarian theory, for example, that bargaining success is a function of form as much as substance—that how one puts a point counts as much as what one says. Prospect Theory provides a sophisticated conceptual apparatus for organizing and defending these views.<sup>164</sup> Prospect Theory can be interesting and counterintuitive, but the communitarian adaptive re-use of

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<sup>162</sup> See generally Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

<sup>163</sup> See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representations of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003); see also JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); CHOICES, VALUES AND FRAMES (Daniel Kahneman & Amos Tversky, eds., 2000).

<sup>164</sup> Two bargainers equally understanding of and skilled at implementing the insights of Prospect Theory would be a sight to behold, a sort of a reverse Alphonse and Gaston. Rather than avoid making the first offer, they would take the initiative—thrusting and parrying with enthusiasm and finesse, neutralizing one another in a maelstrom of anchoring, framing, adjusting, and the like. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 7–12, 14–20, 42–47, 46–51 (1999) (describing the application of Prospect Theory principles to civil dispute bargaining in terms of the mutually cancelling categories of "barriers" and "remediation[s]"). As Alex Stein shows in his analysis of the well-known Blue Cab experiment from the literature of Behavioral Economics, people can avoid such decision errors when properly alerted to them. See Stein, *supra* note 94, at 6. Traps in experiments designed to catch subjects in such errors are, as Stein says, a "conjurer's sleight of hand: each trick can be played only once. [T]he play uncovers and thereby destroys the trick." See *id.* at 6. See also J. D. Trout, *Paternalism and Cognitive Bias*, 24 LAW & PHIL. 393, 417 (2005) ("psychological findings do not show that people CAN'T make good choices—in fact, there has been far less research on correcting biases than establishing their existence"). Trout describes what he calls "inside strategies" for improving the accuracy of judgment, that is, strategies for "creating a fertile corrective environment *in the mind*." *Id.* at 418. His discussion is part of a larger project to show how epistemology can uncover the normative principles underlying what Trout terms "Ameliorative Psychology," those branches of psychology that show how people can improve their reasoning. See *id.* For a discussion of "Ameliorative Psychology," see MICHAEL A. BISHOP & J.D. TROUT, *EPISTOMOLOGY AND THE PSYCHOLOGY OF HUMAN JUDGMENT* 3, 11–16, 26, 54–70, 154–57, 170–71 (2004).



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it is often just the linguistic repackaging of its most common sense nostrums in the guise of high theory. It reminds one of the elastic uses made of the concept of "paradigm" by the disciples and imitators of Thomas Kuhn.<sup>165</sup> In an earlier era, work of this sort would have been dismissed on the ground that "it might be social science but it's not news,"<sup>166</sup> but that reaction seems to have lost much of its appeal in a world where even junk science is often seen as better than no science at all. Interesting social science work on bargaining exists,<sup>167</sup> of course, and no doubt it will continue to be produced,<sup>168</sup> but until

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<sup>165</sup> See Jeff Sharlet, *A Philosopher's Call to End All Paradigms*, CHRON. HIGHER EDUC., Sept. 15, 2000, at A18 (discussing THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970), and the many ways in which "paradigm" was misunderstood and misused). Lawyers associated with the Collaborative Family Law (CFL) movement are among the known offenders. See, e.g., MACFARLANE, *supra* note 124, at 33 (CFL lawyers describe the fact that they use collaborative law practices in interactions with family members as a "paradigm shift"). Professor Menkel-Meadow also bemoans the fact that references to "paradigm shift" have become "trite," but then uses the term in similar fashion herself. See Menkel-Meadow, *supra* note 9, at 487–88.

<sup>166</sup> For examples from the legal bargaining literature, see Orr & Guthrie, *supra* note 2, at 611 ("Opening offers, policy limits, damage caps, and other starting figures appear to influence outcomes at the bargaining table."); *id.* at 624 ("negotiators can harness the power of anchoring by setting high goals for themselves prior to negotiation."). Orr & Guthrie also advise that "[w]hen negotiating a car purchase . . . negotiators should rely on statistical data available in such publications as *Consumer Report* (sic) or *Kelley's* (sic) *Blue Book* to help them determine an appropriate deal point." *Id.* at 626–27. This suggestion appears directly under a page header which reads "New Insights from Meta-Analysis." *Id.* (emphasis added). There is no indication as to whom this would be new(s), though there is evidence that some car buyers could benefit from knowing it. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiation*, 104 HARV. L. REV. 817, 856 (1991) (describing the remarkable ignorance with which most purchasers approach the task of buying a new car—almost half of all purchasers pay retail).

<sup>167</sup> See, e.g., Catherine H. Tinsley, Kathleen M. O'Connor, & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 621 (2002). The Tinsley article illustrates both the benefits and limitations of this new social science work. Tinsley and her colleagues show, among other things, that a reputation for "distributive [bargaining] hurts a party because the negotiator facing that party forms negative prejudices of that party's intentions, which then affect the subsequent interaction." *Id.* at 637. This will not come as news to experienced bargainers. What better evidence of how an adversary will behave could there be than how he behaved in the past, and what better evidence of how he behaved in the past could there be than his reputation. More importantly, the mechanism Tinsley and her colleagues used to introduce the independent variable of reputation into their experiments has no analogue in real-life bargaining. Unlike law practice, where a bargainer must deduce an adversary's reputation from a confusing and often contradictory welter of gossip, public records, prior direct experiences, and the like, Tinsley's subjects

it is based on data taken directly from actual bargaining practice, it will be of limited relevance to real-life bargaining practice. I discuss this topic at greater length in the next section. Here, I describe a few communitarian contributions to the language (ours, most of the time) of bargaining theory.

An unexpected example of "nominalism about realism" is Dan Orr and Chris Guthrie's article extolling the analytical power of the Prospect Theory concept of "anchoring."<sup>169</sup> Professor Guthrie has written extensively about bargaining and his work is original, intelligent, and sophisticated. Anchoring is an interesting phenomenon, and everything else equal, bargainers generally

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were told that their adversaries were "particularly adept at distributive bargaining" (or they were not given any information about their adversary's bargaining reputation at all). *Id.* at 629. They then conducted their negotiations by email, which limited the opportunity to test this information and ruled out the use of so-called paralinguistic data (e.g., demeanor, non-verbal behavior, attitude, and the like). *Id.* at 628. While the study may be instructive on the non-controversial question of whether reputation influences expectations, therefore, it has less to say about the more important (at least for practical purposes) issues of how reputation is created, whether it can be manipulated, and how pre-conceived views about it can be tested. If bargainers control the development of their reputations to even a small extent, or if their reputations are never as clear as Tinsley's study represented them to be, the significance of the study is greatly qualified.

<sup>168</sup> One of the most interesting aspects of this research involves an attempt to discover the common currency the brain uses to encode and activate the different elements involved in cost-benefit calculations, including calculations made during negotiations. Spinney, *supra* note 74, at 32–35 (describing how bidding in an auction is associated with greater activity in the "orbitofrontal-striatal network"). Correlations between brain activity and decision choices may not explain the judgment process, of course, or show how it can be influenced. Syntax is not semantics, as John Searle famously argued in his Chinese Room example (though the argument was vigorously criticized and the debate may now have become "quasi religious," see Stanford Encyclopedia of Philosophy: The Chinese Room Argument, <http://plato.stanford.edu/entries/chinese-room/#5.1> (last modified March 22, 2004)), but the benefits of understanding the neurobiology of how the brain makes judgments could be far-reaching. Spinney, *supra* note 74, at 35 (describing the implications of coming up with a "reliable neurobiological model of human decision making").

<sup>169</sup> Orr & Guthrie, *supra* note 2, at 605–12. Prospect Theory might be abandoning, or at least downgrading, the concept of anchoring. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 56 (Thomas Gilovich et al. eds., 2002) ("It has become evident that an *affect heuristic* should replace anchoring in the list of major general-purpose heuristics.") (citation omitted). *But see* Daniel T. Gilbert, *Inferential Correction*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 167 (arguing that "anchoring and adjustment [describe] the process by which the human mind does virtually all of its inferential work").

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are better off knowing about it than not.<sup>170</sup> The Orr and Guthrie article has a worthy objective, it responds to a genuine need and the authors are accomplished commentators on the subject, yet some place in the execution stage things go linguistically off track. Throughout the article, Orr and Guthrie use a confusing sort of social-sciencespeak to describe the influence of suggestion on bargainer expectation, aspiration, and behavior. They define anchoring, sensibly, as the process of giving undue weight to the first number one encounters in estimating the value of a bargained-for item by permitting that number to "exert[] a stronger impact than . . . subsequent pieces of numeric information."<sup>171</sup> They assert that this not always rational phenomenon<sup>172</sup> is caused by a "fail[ure] to adjust . . . [a]way from the anchor,"<sup>173</sup> even though that is a little like saying one anchors because one does not "not anchor." They acknowledge that this explanation begs the question and quickly add that "fail[ing] to adjust" is caused by "a lack of cognitive effort" in the face of "uncertainty."<sup>174</sup> Again, this does not shock. "I just didn't think," is a common reaction when things do not go as well as one had expected. Orr and Guthrie continue in this vein for several pages, taking common-sense phenomena for which ordinary language terms exist and relabeling them to provide readers with several new ways to express the

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<sup>170</sup> *But see* Orr & Guthrie, *supra* note 2, at 627–28 ("lawyers may be better able than others to resist biases, including anchoring").

<sup>171</sup> *Id.* at 600 (quoting Fritz Stack & Thomas Mussweiler, *Heuristic Strategies for Estimation Under Uncertainty: The Enigmatic Case of Anchoring*, in *FOUNDATIONS OF SOCIAL COGNITION: A FESTCHRIFT IN HONOR OF ROBERT S. WYER, JR.* 79, 80 (Galen V. Bodenhausen & Alan J. Lambert eds., 2003)).

<sup>172</sup> Suppose, for example, the first number one encounters in trying to place a value on an item is greatly exaggerated. The fact that it comes first should not give it any particular influence in the process of assessing value.

<sup>173</sup> Orr & Guthrie, *supra* note 2, at 602. Orr and Guthrie offer several explanations for this behavior and call each one a "theory" (e.g., "Social Implications Theory," "Insufficient Adjustment Theory," "Numeric Priming Theory," and "Information Accessibility Theory"), though I assume they use theory here in some non-technical sense of the term. *Id.* at 602–04. If failing to adjust to an anchor number is a "theory" of why the number has a disproportionate influence on outcome, Orr and Guthrie will need to explain the difference between theory on the one hand, and cause on the other. Each of the "theories" listed seems more accurately described as a ordinary intellectual or psychological phenomenon (i.e., in the order of the above parenthetical: believing the other person when he says the number is relevant; not thinking carefully about whether the number is relevant; according too much relevance to the number that comes first; letting the fact that one treats the number as provisionally true for purposes of evaluating it count as evidence of its relevance). *See id.*

<sup>174</sup> *Id.* at 603.

ideas of "think," "analyze," "judge," "aspire," "demand," and the like. Ordinary terminology would have worked as well.

Russell Korobkin, in an article describing some of the reasons parties fail to settle,<sup>175</sup> also re-labels well known bargaining concepts to produce a welter of new terms that add few substantive ideas to those already in place.<sup>176</sup> Like Professor Orr, Professor Korobkin has written extensively about bargaining, and his work is among the best in the field, but he has the habit of replacing familiar terms that are understandable with personal substitutes that often are not. His preferences for "bargaining zone" over "bargaining range," and "walkaway point" over "reservation point"<sup>177</sup> are not controversial. However, he describes bargaining as "a process by which the parties de-bias each other" (it sounds painful but in this context it seems to mean argue to one another to correct misunderstandings);<sup>178</sup> characterizes the

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<sup>175</sup> Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000) [hereinafter Korobkin, *A Positive Theory*]; see also Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281 (2006) [hereinafter Korobkin, *Impediments*].

<sup>176</sup> Professor Korobkin describes his purpose as providing a new way to think about negotiation. Korobkin, *A Positive Theory*, *supra* note 175, at 1791–92 ("This article presents a new dichotomy that creates a clear theoretical structure for viewing . . . legal negotiation. [It] presents not a new way to *negotiate* but a new way to *think about negotiation*."). Since his principal concepts of "zone definition" and "surplus allocation" describe (and run together) negotiation processes that already were well-known and extensively discussed (e.g., information bargaining, conversational advocacy, trading and the like), it seems more accurate to say that he provides a new way to talk about negotiation. *Id.*

<sup>177</sup> Korobkin, *A Positive Theory*, *supra* note 175, at 1791, 1794 ("First, negotiators attempt to define the bargaining zone—the distance between the reservation points (or 'walkaway' points) of the two parties.").

<sup>178</sup> Korobkin, *Impediments*, *supra* note 175, at 297. This newly popular (at least with legal commentators) concept of de-biasing comes from the field of behavioral economics. For a description, see Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422 (Daniel Kahnemen, Paul Slovic, & Amos Tversky eds., 1982). For an excellent discussion of the several different forms it can take, see generally Christine Jolls & Cass R. Sunstein, *Debiasing Through Law* (U. Chicago Law & Economics, Olin Working Paper No. 225, Harvard Law & Economics Discussion Paper No. 495, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=590929](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590929) (last visited Mar. 4, 2008) (describing examples of "debiasing law," that is, insulating legal outcomes from the effects of boundedly rational behavior, and "debiasing through law," that is, "steering legal actors in more rational directions"). For a description of the field of behavioral economics, including how it differs from and adds to economics generally, see BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed., 2000); Russell Korobkin &

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relationship between bargainer anger and bargaining impasse in terms of a "malevolent utility function" (the extent to which the parties like or dislike one another);<sup>179</sup> warns about "the second order problem caused by divergent construals" (parties are more likely to accept a settlement if they think the other side was respectful, dignified and honest);<sup>180</sup> and adopts the concepts of "correspondence bias" (blame the person, not the situation, when the other bargainer does bad things), "actor-observer bias" (blame the situation not the person when you do bad things), and "naïve realism" (trust your own beliefs more than others), all on a single page.<sup>181</sup> Within a particular "interpretive communit[y],"<sup>182</sup> so to speak, this is an understandable way to converse, but it is not the best way to talk to lawyers.<sup>183</sup>

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Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). For a general-audience description, see Craig Lambert, *The Marketplace of Perceptions*, 108 HARV. MAG. Mar.-Apr. 2006, at 50 (describing behavioral economics as "the study of how real people actually make choices").

<sup>179</sup> Korobkin, *Impediments*, *supra* note 175, at 300. Korobkin explains why settlements fail in this way: "dispositional attributions lead to anger; anger helps to create malevolent utility functions; and malevolent utility functions reduce the likelihood of parties reaching agreement . . . because the parties want not only to vindicate their legal entitlements but also to cause pain to their adversaries. Thus, dispositional attributions reduce the likelihood of . . . settlement." *Id.* at 301. One might paraphrase the explanation in this way: "Parties don't settle because they get mad at what they think (sometimes mistakenly) are the other party's motives."

<sup>180</sup> *Id.* at 322.

<sup>181</sup> *Id.* at 302. William Ury makes the most colorful contributions to the communitarian bargaining lexicon in his "Hostage Negotiation" story discussed earlier. See *supra* notes 98–116 and accompanying text.

<sup>182</sup> STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 147, 171–72 (1980) (describing the concept of "interpretive communities").

<sup>183</sup> J.D. Trout makes a similar point when discussing the relative intelligibility of probabilistic and frequency formats for presenting statistical data to non social scientists. See Trout, *supra* note 164, at 423–24 ("People with no training in statistics tend to do much better on problems presented in the frequency format."). But he also acknowledges that "the start up costs [in translating technical language into ordinary language] may exceed, by a large margin, the opportunity costs of relying on untutored judgment in unstructured settings." *Id.* at 425. Similarly, I do not deprecate the helpfulness and sometimes necessity of using technical language. Some social phenomena are complicated and not easily described in words found routinely in Websters'. But most bargaining behavior is ordinary social behavior and can be analyzed fully in the vocabulary of ordinary discourse. Lawyers use ordinary language, lawyers are the bargainers of the legal world, and one of the principal purposes of bargaining theory is to inform bargaining practice. It would seem sensible, therefore, for bargaining scholarship

Perhaps the most confusing aspect of this tendency on the part of communitarian commentators to construct a linguistically original world is that new language is not needed. Well-understood terminology is available to describe everything communitarians want to discuss. Making up non-intuitive substitutes—for example, what could be the intuition behind "Go to the Balcony"—makes discussion more confusing and less productive. One must keep flipping back to check on definitions to understand the point. At its core, demanding that discussion proceed in one's own idiosyncratic and non-intuitive language is an asocial act. It closes off the universe of discourse to all but select insiders and gives those insiders a trump card with which to shut down conversation whenever it becomes unpleasant or critical. This move effectively insulates communitarian theory from any outside check and makes it a "self-sealing" world view.<sup>184</sup> The willingness to talk with only one's self reminds one of the communitarian criticism of adversarial bargaining—that it is a "take it or leave it" system of conversation which demands that others agree.<sup>185</sup> Once again, communitarian scholarship finds itself modeling the behavior it criticizes.

### *C. The Empirical Case for Communitarian Bargaining*

Much of the scholarly support for communitarian bargaining comes from the normative arguments discussed above. This scholarship is not empirical, and that is a little surprising.<sup>186</sup> If it did anything, communitarian theory instigated a debate over the relative merits of two distinctly different approaches to legal bargaining, and one would think the best way to resolve such a debate would be to compare the two approaches in operation.<sup>187</sup> For

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to use ordinary language whenever possible, if for no other reason than to increase its chances of having a practical effect. Orr and Guthrie seem to recognize that they are in the business of giving advice to lawyers. See Orr & Guthrie, *supra* note 2, at 627–28 ("lawyers are the consummate expert negotiators").

<sup>184</sup> CHRIS ARGYRIS & DONALD A. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 26 (1974) (describing the property of being "self-sealing").

<sup>185</sup> See Schneider, *supra* note 7, at 178.

<sup>186</sup> *Id.* at 148–49 ("[T]here have been few empirical studies of the negotiation behavior of lawyers," describing Gerald Williams's 1976 study as "the most frequently cited and well-known.") (citing GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 15–46 (1983)).

<sup>187</sup> It also is interesting that lawyers have not discovered the benefits of communitarian bargaining for themselves. If communitarian methods are best for everyone involved, one would think lawyers collectively would have happened upon that

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whatever reason, this has not happened. There are a few empirical studies of the two approaches, and I will discuss the best known ones here, but they are the exception rather than the rule.<sup>188</sup> To their credit, these studies are more analytically interesting than the "literary" arguments made above, but they also often start from the same faith-based commitment to communitarian theory that characterizes the above work,<sup>189</sup> and lapse into the adversarial rhetorical tactics reminiscent of it as well.

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insight, even accidentally, at some point or another over the years. Law practice provides a kind of laboratory in which to collect and test data on what produces the best results. While "practice experiments" may proceed more serendipitously than those in a laboratory, they also are likely to be more long-lived and be based on a larger body of data, "number-crunching" their way to solutions. If communitarian bargaining is truly in everyone's best interest therefore, lawyers should have discovered that fact on their own and yet they cling stubbornly to their old-fashioned, adversarial methods. What explains that? Professor Menkel-Meadow wonders about the same thing. See Menkel-Meadow, *supra* note 9, at 485–87, 498–500. Perhaps there is something to the methods.

<sup>188</sup> Schneider, *supra* note 7, at 148. This pattern may be changing. See, e.g., Relis, *Consequences*, *supra* note 74.

<sup>189</sup> Schneider, *supra* note 7, at 148 (describing how "adversarial attorneys have become more extreme and less effective in the last twenty-five years," evidence to the contrary, even in her own work, notwithstanding); see Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 612 (2006) (finding family lawyers "more adversarial and less problem solving than other types of" lawyers); Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997) (finding positional bargaining used 71% of the time and problem-solving bargaining 16% of the time in civil litigation practice in New Jersey); Menkel-Meadow, *supra* note 9, at 487 ("I fear that ideas of adversarialism, competition for seemingly scarce resources, individual or national maximization strategies, so-called 'clashes' of competing interests and cultures, and vested interests in competitive habits—rather than cooperation or collaboration—continue to thrive and to blunt the great vision of human potential at the heart of" communitarian theory). A number of studies also have found that students and lawyers believe misrepresentation and deception are widespread and appropriate in bargaining practice. See e.g., Robert J. Robertson et al., *Extending and Testing a Five Factor Model of Ethical and Unethical Bargaining Tactics: Introducing the SINS Scale*, 21 J. ORG. BEHAV. 649 (2000); Roy J. Lewicki & Robert J. Robertson, *Ethical and Unethical Bargaining Tactics: An Empirical Study*, 17 J. BUS. ETHICS 665 (1998); Roy J. Lewicki & Neil Stark, *What is Ethically Appropriate in Negotiations: An Empirical Examination of Bargaining Tactics*, 9 SOC. JUST. RES. 69 (1996); Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173 (1989).

### 1. *The Williams Study*

Gerald Williams was the first modern legal academic to study bargaining empirically.<sup>190</sup> In a research program involving questionnaires, interviews, and videotaped observations, he asked one thousand lawyers to rate the effectiveness of the last lawyer with whom they had bargained—on a scale of effective, average, or ineffective—and to describe that lawyer's bargaining approach (as cooperative or competitive).<sup>191</sup> Nearly half of his respondents described their last opponent as effective, and four out of five of those opponents as cooperative.<sup>192</sup> Not all cooperative bargainers were seen as effective, of course. Some were average and some were ineffective, and competitive bargainers sometimes were described as effective, but for the most part, Williams's respondents reported a strong correlation between cooperative methods and bargaining effectiveness.<sup>193</sup> Williams concluded from this that lawyers are best off adopting a communitarian approach to bargaining because other lawyers prefer it and work more easily with it.<sup>194</sup> When most of the world is communitarian, or thought to be so, one should go along to get along.<sup>195</sup>

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<sup>190</sup> See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983). Williams and his colleagues updated this work in 1986 and published the results of a follow up study in 1991. See Lloyd Burton et al., *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 J. DISP. RESOL. 199; see also Schneider, *supra* note 7, at 148–49 (describing the Williams study as the "most frequently cited" and "well-known" of the empirical studies of lawyer bargaining). Cornelius Peck published an earlier casebook on negotiation. See CORNELIUS J. PECK, *CASES AND MATERIALS ON NEGOTIATION* (1972).

<sup>191</sup> WILLIAMS, *supra* note 190, at 15–18.

<sup>192</sup> *Id.* at 18–19.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 19 ("The higher proportion of cooperative attorneys who were rated effective does suggest it is more difficult to be an effective competitive negotiator than an effective cooperative [negotiator]"). Williams makes several additional claims. For example, he argues that impasse and deadlock are more common when bargainers are not nice to one another, and that being unpleasant will have long term reputational effects that will influence the settlement of future disputes. However, he does not develop these points or support them with evidence from his study. See *id.* at 50–52.

<sup>195</sup> Williams also concluded that "it is not regard or disregard of the social graces which determines an attorney's negotiation effectiveness," but legal astuteness, or the ability to be "perceptive, analytical, realistic, convincing, rational, experienced, and self-controlled" in the preparation and presentation of a bargaining case. However, he did not discuss the relationship of this conclusion to his more general point about being cooperative. WILLIAMS, *supra* note 190, at 39–40.



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While pathbreaking in many respects, Professor Williams's study has several weaknesses that undercut its usefulness as a test of the comparative merits of communitarian and adversarial bargaining. To begin with, it is difficult to determine just what his survey respondents meant when they categorized their last bargaining opponents as effective or ineffective. Williams did not provide his respondents with a definition of effective bargaining or a list of specific qualities to take into account in making this determination. He talked about the topic of effectiveness at length and listed a number of factors one might consider in formulating a definition,<sup>196</sup> but he also acknowledged that views on this issue differ widely, and did not say what he thought was the best view.<sup>197</sup> Thus, lawyers responding to his survey were free to use any definition of effectiveness they liked, and there is reason to believe they used several.<sup>198</sup> One can sympathize with Professor Williams's plight. Bargaining effectiveness, like bargaining power, is nearly impossible to define in a non-circular fashion.<sup>199</sup> Almost any attribute, resource, maneuver, or approach can be effective in the right circumstances or with the right adversaries. The assumption that everyone must have the

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<sup>196</sup> *Id.* at 7–10.

<sup>197</sup> Williams acknowledged as much when he conceded that "people have a wide variety of beliefs about what constitutes effectiveness in negotiation." *Id.* at 8. He presents a "set of hypotheses about effectiveness," but admits that not all would agree with them and does not indicate whether he communicated them to his subjects. *Id.* at 42–43.

<sup>198</sup> See Condlin, *Bargaining in the Dark*, *supra* note 28, at 20–21.

<sup>199</sup> The difficulty is in making predictions about bargaining outcome. Often, it is not hard after a negotiation is over to identify the factors that were influential in shaping its result, but it is much more difficult to say in advance what those factors will be. No attribute or resource is inevitably powerful. Ignorance, lack of resources, or even a failure to understand the issues at stake could be a source of leverage in the right circumstances. Still, academics cannot resist having a go at defining bargaining power. See, e.g., Russell Korobkin, *On Bargaining Power*, in *THE NEGOTIATOR'S FIELDBOOK*, *supra* note 15, at 251 (Power is "the ability to convince the other negotiator to give us what we want."). Professor Korobkin's ambivalence about the subject is evident throughout his discussion. For example, within a section entitled "The Risks of Power," he says both that "[i]n any situation in which a mutually beneficial agreement [is] possible, the party with relatively less power would yield to the party with relatively more," and almost immediately after that, "the less powerful party might resent the sense of coercion or inequity inherent in the more powerful negotiator's demands and refuse to yield, even knowing that this course of action will result in a worse outcome for himself." *Id.* at 255. If I follow this correctly, a less powerful negotiator (however defined) could either yield or not yield as circumstances dictate. See also Orr & Guthrie, *supra* note 2, at 624–26 (recommending that bargainers both exploit the unselfconscious biases of other bargainers and adopt "de-biasing" strategies to prevent such exploitation).

same qualities in mind in describing an opponent as effective or ineffective, therefore, is rarely warranted. The lack of a single, consistent definition of one of its central concepts is a serious problem for an opinion survey, however, and in Williams's case it was fatal. If one cannot know for certain what his lawyer-respondents thought they were asked—or what they said in response<sup>200</sup>—it also is not possible to know what to make of Williams's analysis of their answers.

There is a second difficulty with the Williams study—this one involving the categories of cooperation and competition—that further complicates the task of assessing its results. Williams did not distinguish between substance and style in asking his respondents to categorize their opponents' behavior as cooperative or competitive, and substance and style are two distinctively different realms. Take competitiveness. One can threaten, make *ad hominem* attacks, use a didactic or condescending tone, or score debater's points all independent of the topic being discussed. This is stylistic competitiveness (even when done on behalf of a substantively correct position), and its goal is to win the conversational exchange at the level of personal, rhetorical skill, to be verbally quicker and more clever than the other bargainer. Conversely, one can make strong but justified demands, refuse to change views without good reasons, and defend views with complicated and extensively developed arguments, albeit in a respectful, personable, and open-minded manner. This is substantive competitiveness, and its goal is to insure that any agreed-upon settlement protects one's rights.

It is impossible to tell from the responses to Professor Williams's questions whether the competitiveness his respondents described was socially rude and obnoxious behavior or strong substantive argument, and the difference is crucial. Stylistic competitiveness is almost always inappropriate in bargaining (and usually ineffective as well), but substantive competitiveness is unavoidable.<sup>201</sup> If bargainers do not make justified demands and take principled stands, even when they go beyond what other bargainers expect, they will have waived their clients' interests unilaterally and conceded rather than settled their disputes. No doubt, communitarians object only to stylistic competitiveness. Their critique of adversarial

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<sup>200</sup> There is reason to believe that the lawyers gave the highest marks for effectiveness to opponents who were good at routinely processing cases and the lowest marks to opponents who fought for better than average settlements. See Condlin, *Bargaining in the Dark*, *supra* note 28, at 20–21. If this is correct, it would undercut the appeal of Williams's conclusions.

<sup>201</sup> Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65, 72–79 (1985).

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bargaining, for example, is based mostly on examples of belligerent, insensitive, and socially inappropriate behavior rather than examples of forceful argument and justified demands. Almost certainly they do not mean to recommend conceding claims just to be nice or to insure that everyone comes away from a negotiation with roughly the same payoff. That is a program for resource redistribution rather than bargaining. Communitarians could express their objections to adversarial bargaining more clearly, therefore, but whether they do or not, socially inappropriate behavior must be what they have in mind when they complain about bargainers as being "adversarial" or "positional."<sup>202</sup> Professor Williams's failure to ask whether past opponents were "tough," "forceful," and "aggressive," because of what they said or how they said it, therefore, makes it difficult to determine what, if anything, his study shows about the relationship between communitarian methods and bargaining effectiveness.

There is a final problem with the Williams study that plagues all empirical research that commingles the task of collecting data with the task of evaluating it. Williams asked his lawyer-respondents to categorize their opponents' bargaining behavior as cooperative or competitive at the same time that they evaluated it as effective or ineffective.<sup>203</sup> One would expect the lawyers to tell consistent stories in this situation, to insure that their descriptions of what happened matched their evaluations of whether the behavior was effective, and thus it should come as no surprise that most of the lawyers characterized their last opponents as cooperative.<sup>204</sup> The lawyers had settled with these opponents after all, and since they (the lawyers) presumably did not believe they could be bullied, deceived, or intimidated, they also must have believed that their opponents approached them in a cooperative manner (or they would not have settled).<sup>205</sup> The lawyers' stories

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<sup>202</sup> It may be that communitarians object only to unskillful adversarial bargaining, not adversarial bargaining generally. I discuss that possibility in more detail shortly.

<sup>203</sup> WILLIAMS, *supra* note 190, at 17 ("When they had completed the descriptive ratings, they were asked to rate the negotiating effectiveness of the attorney they had described.").

<sup>204</sup> Assigning party roles to participants in a settlement exercise before telling them the facts of the case skews participant judgments about outcome in a related fashion. See Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 213, 224–25 (Morton Deutsch & Peter Coleman eds., Jossey-Bass 2000) ("people who know their roles from the beginning [of the exercise] have a very difficult time coming to an agreement. The high impasse rate . . . is linked to self-serving judgments of fairness.").

<sup>205</sup> Sometimes lawyers settle on terms they know are bad in response to bargaining maneuvers they think are ineffective because external circumstances make settling

may have been true,<sup>206</sup> but it would take direct data about their actual bargaining behavior to confirm that fact, and that is precisely the kind of data the Williams study does not have.

## 2. *The Schneider Study*

Professor Williams is not alone in these problems. Communitarian empirical work on bargaining tends to confuse perception with reality by equating what lawyers say about bargaining with bargaining itself. Andrea Kupfer Schneider's update of the Williams study, based on a more elaborate version of Professor Williams's research instrument,<sup>207</sup> is a case in point. Professor Schneider entitles her study "Empirical Evidence on the Effectiveness of Negotiation Style," but it is clear from the outset of her article that she is describing lawyer perceptions of negotiating style,<sup>208</sup> not negotiating style itself, and by the end of the article she has turned the rule of

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necessary (or at least advisable). An adverse bargainer need not always be communitarian for a lawyer to settle. I assume this is not the prototypical experience for most bargainers, however, and not the one they would be most likely to remember and report in a survey about their bargaining practice.

<sup>206</sup> For an example of how lawyer beliefs and expectations about their own bargaining behavior do not always reflect reality, see Condlin, *Bargaining with a Hugger*, *supra* note 7, at 60–71.

<sup>207</sup> Schneider, *supra* note 7, at 152–58 (describing "updates" to the Williams study instrument). Within the legal bargaining academy, Schneider's study is thought to be an excellent example of empirical research and to make a strong case for the superiority of the communitarian model. The study is reproduced at disproportionately greater length in the Wiggins and Lowry reader, for example, see WIGGINS & LOWRY, *supra* note 15, at 163–74, and appears in almost all of the negotiation casebooks. While it is true that her update of the Williams survey instrument adds many new categories of information and choices, it has little in the way of new descriptive material about bargaining style or bargaining effectiveness to help lawyers make these choices. She not only fails to provide a definition of effectiveness, for example, she explicitly refuses to provide one. *Id.* at 195 ("[T]he meaning of effectiveness is left to each responding attorney to determine."). As a consequence, her work reproduces most of Williams's mistakes, magnifying some and minimizing others, without offering any new antidotes. Schneider, *supra* note 7, at 155 (describing why the effectiveness rating scale of Williams's survey was left in its original form). This has the unfortunate effect of piling up the confusions left by Williams's study rather than resolving them. Schneider has extended her research into other areas of bargaining, but her methodology remains the same. See Schneider & Mills, *supra* note 189, at 612. She also continues to describe her analysis as about reality ("What Family Lawyers Are Really Doing"), rather than perception. *Id.*

<sup>208</sup> Schneider, *supra* note 7, at 147 ("[T]he study shows . . . that a negotiator who is assertive and empathetic is *perceived* as more effective.") (emphasis added).

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"perception over reality" into an epistemological principle.<sup>209</sup> There seems to be some hard-to-alter feature of the communitarian mindset that prefers form over substance.<sup>210</sup>

The most confusing part of Professor Schneider's survey is her attempt to differentiate effective from ineffective bargaining and adversarial from communitarian style.<sup>211</sup> She talks around these concepts at great length, but does not work with a consistent definition of them. She does a lot of "name-calling"—associating communitarian bargaining with positive characteristics and adversarial bargaining with negative ones—but for the most part, the characteristics she lists are so general in nature as to depend for their meaning almost exclusively on the preconceptions and beliefs of the persons using them. For example, whether an adversary is seen as "arrogant" or "confident," "headstrong" or "persistent," "obsequious" or "friendly," (in each instance, the former is a characteristic of adversarial bargaining and the latter a characteristic of communitarian bargaining<sup>212</sup>) will be different for bargainers with different degrees of self-confidence and skill, and different levels of bargaining experience. These judgments will be even more subjective when they involve questions of degree, such as whether an opening bargaining demand is "extreme," or an initial position is "unrealistic."<sup>213</sup> As a consequence, it is almost impossible to know what Professor Schneider's respondents had in mind in answering her questions without knowing a good deal more about the respondents themselves and the bargaining situations they faced.

Professor Schneider's discussion has other interesting definitional conundrums as well. For example, she equates effective bargaining with

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<sup>209</sup> *Id.* at 196 ("[L]awyers' perceptions of other lawyers are the closest we can get to objective conclusions about effective negotiation behavior.")

<sup>210</sup> See *supra* notes 163–164 and accompanying text. For another example of the communitarian preoccupation with perception over substance, see Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 754 (2004) (limiting discussion of bargaining fairness to perceptions of fairness, seemingly on the belief that it is not possible to get the real thing: "People often disagree . . . whether an outcome is fair. The definition of distributive fairness is, therefore, inevitably subjective."). See also Tinsley et al., *supra* note 167, at 639 ("[C]ognitions and behaviors may be intertwined such that one party's *perceptions* of the other side can affect the other side's *actual behavior*."); BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 8 ("When a procedure is *perceived* to be fair . . . it is more likely to lead to outcomes that are viewed as legitimate by all the parties.").

<sup>211</sup> Schneider, *supra* note 7, at 185–90. Problem-solving is her most consistent synonym. *Id.* at 161–72.

<sup>212</sup> *Id.* at 163–67.

<sup>213</sup> *Id.* at 177.

ethical bargaining and thinks that adversarial bargaining is unethical,<sup>214</sup> but she never says what she means by "ethical." She must have more in mind than simple compliance with the legal profession's disciplinary rules, since many of the things she objects to (arrogance is a recurring example)<sup>215</sup> may be distasteful, but are not a basis for bar discipline. The few examples of unethical behavior she gives, taken from the supplementary comments of some of her respondents, do not describe self-evident ethical violations, and probably do not describe ethical violations at all if all of the facts are known.<sup>216</sup> She must use "ethical" to mean more than ethical in the conventional sense, therefore, but it is not clear what this "more" consists of.

In similar fashion, Professor Schneider equates communitarian bargaining with putting the client's interests first<sup>217</sup>—which is not controversial—but then she assumes that making large demands and trying for the biggest possible payoffs are examples of lawyers elevating their own interests over those of clients.<sup>218</sup> This is inexplicable. Most of the time in bargaining, client interests and lawyer interests are intertwined, and a lawyer does better for the client when he does better for himself. There are genuine

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<sup>214</sup> *Id.* at 166 ("For problem-solving negotiators, the highest goal is conducting oneself ethically," while for the adversarial negotiator, "[i]f the negotiation becomes focused on ego or making money for the lawyer, one could legitimately wonder if the client's interest is being well served.").

<sup>215</sup> Schneider seems almost phobic about arrogance, repeating the characterization several times during the course of her discussion. *See, e.g., id.* at 147, 153, 154, 163, 165, 177, 181.

<sup>216</sup> Schneider, *supra* note 7, at 166–67. The best example of this is a series of maneuvers taken from what appears to be a plea bargaining scenario. Schneider describes (1) "having various attorneys contact the state's Attorney" (presumably to lobby for one's client), (2) "bringing in an attorney who was friendly with the judge," and (3) "filing numerous meritless motions" (I take it this means "file numerous motions," since there is no indication that the motions were denied or that the attorney was sanctioned for filing them—"meritless" in this context seems to be a synonym for "motions I disagree with") as examples of "dirty tactics." There is no reason to believe that any of these moves is *per se* unethical, and it would take a good deal more information than Schneider provides to make any of them unethical in context. No ethics rule prohibits any of them, for example, and all of them seem designed to advance the client's interest. In other parts of her discussion Schneider equates advancing the client's interest with problem-solving bargaining. *Id.* at 165 (describing "maximizing the settlement for the client" as a goal of both adversarial and problem-solving negotiators).

<sup>217</sup> *Id.* at 174.

<sup>218</sup> *Id.* at 166–67.

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principal-agent conflicts in bargaining, of course,<sup>219</sup> but Professor Schneider does not describe any of them, and most of her survey responses are too cryptic—or her respondents too uninformed<sup>220</sup>—to provide the kind of detail needed to raise problems of this sort.

These problems aside, Professor Schneider also seems not to understand the difference between adversarialness and incompetence. If she did, she would not have included all forms of ineffective bargaining behavior in the single, undifferentiated category of "adversarial" (or positional) bargaining. Her picture of the typical adversarial bargainer—as someone who makes take-it-or-leave-it demands, abuses others gratuitously, is arrogant, demeaning, insulting, boastful, and the like—depicts an incompetent bargainer more than an adversarial one.<sup>221</sup> Skillful adversarial bargaining does not offend, antagonize, or insult as much as it pressures, influences, and deceives.<sup>222</sup> It is substantively aggressive, not socially aggressive. The adversarial bargainer Professor Schneider has in mind is using bargaining to work out issues of personal development or exorcise private psychological and emotional demons, not bargain.<sup>223</sup> Such a person needs to be kept in

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<sup>219</sup> On the principal-agent problem in negotiation, see Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

<sup>220</sup> A lawyer ordinarily would not know when the adverse bargainer has demanded an excessively large percentage of the client's recovery as a fee, for example, since an adversary's fee agreement would have been made outside the lawyer's presence. When the lawyer criticizes a large demand as putting the adversary lawyer's interests above the client's, therefore, he is probably saying only that he does not want to meet the demand, not that he knows that it is motivated by lawyer self-interest. Interestingly, communitarians describe this kind of reflexive rejection of a demand as an adversarial bargaining tactic.

<sup>221</sup> Schneider, *supra* note 7, at 164–66 (describing adversarial bargaining).

<sup>222</sup> The plaintiff's lawyers' behavior in the pre-trial conference described in Condlin, *Bargaining with a Hugger*, *supra* note 7, at 15–59, provides examples.

<sup>223</sup> He is the kind of person typically named as a defendant in a Bar disciplinary proceeding, usually for something done during a deposition. See, e.g., *Mullaney v. Aude*, 730 A.2d 759 (Md. Ct. Spec. App. 1999) (male lawyer addressing female lawyer as "babe" and "bimbo" during a deposition); *Carroll v. The Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290 (5th Cir. 1997) (lawyer commenting: "Where the fuck is this idiot going;" "Get off my back you slimy son-of-a-bitch," and "Fuck you, you son-of-a-bitch" while being deposed); and Joe Jamail's now infamous diatribe during a deposition in the

check, of course, but his problems are more substantial than the kind that can be solved by an adequate theory of bargaining. In other words, Professor Schneider's adversarial archetype is a catch-all category for all types of ineffective bargaining behavior, and while this might make it easier to criticize, it does not make it easier for a reader to evaluate the effectiveness of adversarial bargaining.

The Williams and Schneider studies remind one of what used to be called the "GIGO problem."<sup>224</sup> No matter how complicated the machine, and no matter how many times one turns the crank, if what goes in is what is left on the floor after all the good meat has been used, the machine will produce sausage. The Williams study was analytically complicated, and Professor Williams manipulated his data in a sophisticated manner, but one couldn't tell what the data meant. In the end, this quality made the study's results difficult to understand. Professor Schneider's failure to clear up the confusions in Williams's descriptions of bargaining styles, and to provide the definition of bargaining effectiveness that is missing in his study, makes her study an empiricist form of "practicing [your] mistakes."<sup>225</sup> Moreover, her adjectival

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Paramount Communications case, reproduced in *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53–54 (Del. 1994) ("Don't Joe me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon."), along with his response to the Delaware Supreme Court when invited to explain his comments: "I'd rather have a nose on my ass than go to Delaware for any reason." Brenda Sapino, *Jamail Unfazed by Delaware Court's Blast*, TEX. LAW., Feb. 14, 1994, at 11. To view Joe Jamail in action, see YouTube, "Texas Style Deposition," <http://www.youtube.com/watch?v=ZlXmrVbMeKc> (last visited Sept. 24, 2007).

<sup>224</sup> GIGO stands for Garbage In, Garbage Out, a computer science term expressing the informal rule that the integrity of a computer's output depends upon the integrity of its input. The term has fallen out of use as computer programs have become more sophisticated and checks have been built into them to reject improper input. Reputedly, the term was coined by Wilf Hey, the person who developed Report Program Generator, an IBM programming language similar to COBOL and used for the production of large system reports. See The Free Online Dictionary of Computing, "GIGO," <http://foldoc.org/index.cgi?query=gigo> (last visited Feb. 15, 2008). GIGO also can be used to mean Garbage In, Gospel Out, to express the idea that humans sometimes accept the output of computer systems on faith. See Wikipedia, *Garbage In, Garbage Out*, [http://en.wikipedia.org/wiki/Garbage\\_in,\\_garbage\\_out](http://en.wikipedia.org/wiki/Garbage_in,_garbage_out) (last visited Feb. 15, 2008). No one will be surprised to learn that there is a GIGO website and blog. Garbage In, Garbage Out, <http://www.gigo.com/> (last visited Feb. 15, 2008). There are a lot of lonely souls out there dealing badly with the quiet desperation problem.

<sup>225</sup> See Robert J. Condlin, *Learning from Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 CLINICAL L. REV. 337, 345 (1997) (describing the lack of any necessary relationship



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categories are so open-ended and susceptible to idiosyncratic interpretation that she may do no more than record the insecurities, fears, doubts, limitations, and prejudices of her respondents. No doubt, some of the judgments reported to her are correct—it is not likely that everyone was talking about personal history—but without some independent vantage point from which to evaluate the accuracy of the answers, it is impossible to tell which answers are trustworthy and which are not.

Professor Schneider recognizes that some of her respondents might have projected their own bargaining styles onto adversaries and evaluated the adversaries in that light, punishing those who were seen as different and rewarding those who were seen as alike.<sup>226</sup> To protect against this, she asked her respondents to characterize their bargaining styles using the same standards they applied to the adversaries, and then she compared the two sets of characterizations. She expected that "[b]y looking at the average difference between the responding attorney and the studied attorney, [she could] roughly assess the differences between them as negotiators . . . [and then] by comparing these average differences to effectiveness rating[s], [she could] try to see whether the difference in negotiation approach led to lower effectiveness ratings."<sup>227</sup> While admirable, this maneuver does not take into account the possibility that her respondents were not very good reporters of their own bargaining styles. Most people are not; beliefs, hopes,

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between doing something more than once and getting it right—it is possible to just "practice [one's] mistakes").

<sup>226</sup> Schneider, *supra* note 7, at 193. Professor Schneider assumes her respondents "would have at least some understanding of the other side's motivations even if [they] were not particularly empathetic," and that they would be "more accurate in describing and evaluating effective negotiation behavior [of their adversaries] than non-lawyers" because they have "experience" in making such judgments. *Id.* at 195. By "experience" Professor Schneider means that the respondents were educated in the same way as their adversaries, had similar cultural backgrounds, and were familiar with all the same legal idioms and customs. The difficulty with this argument is that the kind of judgments Professor Schneider asked her respondents to make were judgments about ordinary social behavior more than bargaining methodology. She asked about friendliness, arrogance, attentiveness, respectfulness, stubbornness, belligerence, courtesy, and the like, and one doesn't develop any particular expertise in identifying these qualities by going to law school. Though, in all fairness, law school provides plenty of opportunities to do fieldwork.

<sup>227</sup> *Id.* at 193. More specifically, she asked each respondent to rate the importance of each of fourteen negotiation goals on a scale of one to five. Previously, she had asked them to rate their last negotiation adversary on the same scale. She assumed that "attorneys with a similar approach to negotiation will have similar goals in the negotiation." *Id.* at 193.

expectations, and defenses get in the way.<sup>228</sup> If the respondents had positive images of their own styles (and it seems reasonable to expect that most would), they probably took those images from the received wisdom of the settings in which they were trained and had practiced (Where else?). Since Professor Schneider's respondents were young in comparison with the Bar as a whole,<sup>229</sup> their particular versions of received bargaining wisdom would have been relatively current<sup>230</sup> and relatively academic, and thus would have reflected the popularity of the communitarian model. That being the case, one would expect them to think of their bargaining in communitarian terms, even if it was not.<sup>231</sup>

The fact that the respondents were younger than members of the Bar on average also may mean that they had not yet internalized the conventions of ordinary bargaining practice.<sup>232</sup> These conventions are generally more adversarial than social, and Schneider's respondents might have thought themselves incapable of such behavior. When given a choice to describe themselves as likable or arrogant—and Professor Schneider's survey reduces to that choice if socialization and self-awareness are taken out of the

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<sup>228</sup> Argyris and Schön show how this is so. See ARGYRIS & SCHÖN, *supra* note 184, at viii (finding it normal, not exceptional, for people to believe one thing and act as if they believed something totally different). The social science literature on behavioral forecasting also suggests that people are not good reporters on their own social experiences generally. For example, people do not predict their future affective states, preferences, and behavioral responses accurately, tending to believe that "their future reactions will be more intense than they actually are." They also are "overly optimistic in how quickly they can accomplish their goals and tasks [and] are overly optimistic [about] how successful they will be in achieving desired outcomes." See Kristina A. Diekmann, Ann E. Tenbrunsel, & Adam D. Galinsky, *From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies and the Effect of Competitive Expectations*, 85 J. PERSONALITY & SOC. PSYCHOL. 672, 672–83 (2003) (summarizing the literature). In short, most people have idealized visions of themselves and their behavior, and this causes them to describe their experiences in overly positive terms. To understand bargaining, it is necessary to watch people bargain, not ask them how they did it.

<sup>229</sup> Schneider, *supra* note 7, at 159.

<sup>230</sup> This would be true even if most of them had not taken a course in negotiation, as Schneider reports. Schneider, *supra* note 7, at 192. All they needed was a familiarity with current law school intellectual fashion.

<sup>231</sup> See Heumann & Hyman, *supra* note 189, at 255 (finding that positional bargaining is used 71% of the time and problem-solving bargaining 16% of the time in civil litigation practice in New Jersey).

<sup>232</sup> See generally Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties*, 33 S.C. L. REV. 181 (1981); Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982); describing the phenomenon of bargaining conventions and norms.

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picture—most will choose likable. To know whether this is an accurate characterization, however, one would need to see the respondents actually bargain, and Professor Schneider has no direct data on bargaining. In effect, her attempt to control for projection bias ends up comparing behavior (the adverse negotiators') with theory (the respondents'), rather than behavior with behavior or theory with theory. If her argument was a syllogism, it would have an undistributed middle term.<sup>233</sup>

### 3. *The Macfarlane Study*

Perhaps the most interesting of the empirical studies of legal bargaining, notable for its balance and even-handedness, is Julie Macfarlane's examination of the Collaborative Family Law (CFL) movement in the United States and Canada.<sup>234</sup> The CFL phenomenon is the latest in a long line of "true believer"<sup>235</sup> systems popular with the anti-adversarial faction of the

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<sup>233</sup> Professor Schneider discusses other objections that might be made to her survey, but strangely, she does not mention the problem of asking subjects to collect and evaluate data at the same time. Schneider, *supra* note 7, at 193. She does not seem to see how the judgment about effectiveness could influence the way in which behavior was recalled and described. Moreover, asking lawyers to reconstruct past events without any opportunity to consult records, interview witnesses, or use any of the tools of historical research is a little like asking randomly selected citizens to write gospels. That has been tried, and the results were not uniformly satisfactory. See BART EHRLMAN, *LOST CHRISTIANITIES: THE BATTLES FOR SCRIPTURE AND THE FAITHS WE NEVER KNEW* 160–61, 181–202 (2003) (describing the "vitriolic attacks," "polemical treatises," and "personal slurs" used by early Christians in factional arguments over which particular Christian beliefs and practices to affirm in the gospels).

<sup>234</sup> MACFARLANE, *supra* note 124.

<sup>235</sup> Macfarlane's study is replete with CFL practitioner statements, some almost mystical, emphasizing the importance of using CFL methods. Representative examples include: "I don't really care about whether the outcome is optimal in terms of dollars and cents but that [my client] and I live up to our collaborative principles." *Id.* at 59 (alteration in original).

I would say it's [the CFL approach to others] something that I find now that I can't turn "on" or "off." It's just basically "on" now. In fact, I even find from a personal standpoint even the way that I interrelate with my spouse and my family has changed because of it.

*Id.* at 33.

I don't sit there and go through the three inches of information that they [i.e., the clients] bring me, and I'm not going to do that. I don't need to go through and kind of come up with a plan or an idea of how we should approach it beforehand. And I kind of like that. *In a way, the less I know, the cleaner I can make my negotiations, too.*

legal academy and Bar.<sup>236</sup> Macfarlane, a supporter of collaborative law practice, describes the phenomenon as "one of the most significant developments in the provision of family legal services in the last 25 years."<sup>237</sup> CFL bargaining is identified by its "contractual commitment between lawyer and client *not* to resort to litigation to resolve the client's problem"<sup>238</sup> should bargaining fail, and its corollary practice of having lawyers and clients settle their differences in face-to-face, whole-group meetings (often referred to as "Four-Ways"),<sup>239</sup> rather than in meetings between just lawyers. The presence of clients at settlement, it is believed, eliminates—or at least reduces—the posturing and antagonism that characterize the competitive dynamics of "lawyer-to-lawyer" interaction.<sup>240</sup> "Without the potential of litigation in the background," CFL practitioners believe, "lawyers will take different steps and adopt different strategies for negotiation."<sup>241</sup> They will not do things that are "seen as offensive . . . [such as] 'paper' the file" and will be "strongly motivated to settle."<sup>242</sup> In the words of an early proponent, CFL offers "a way to approach a person, with whom one has a perceived conflict, with a request for an honest and detailed examination of the problem, in a way that also offers an absolute and irrevocable commitment to do so in a non-adversarial manner."<sup>243</sup>

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*Id.* at 36–37. "I give as little legal advice as possible, because there is so much contamination and you are trying to get them focussed back on life issues." *Id.* at 37.

<sup>236</sup> Not everyone is a supporter of CFL practice. The Ethics Committee of the Colorado Bar, for example, recently found the signature collaborative law process of withdrawing if settlement talks collapse per se unethical. Colorado Bar Association Ethics Committee, Ethics Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Context, (adopted Feb. 24, 2007), <http://www.cobar.org/index.cfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24/> (last visited Mar. 4, 2008). Other states have expressed related reservations. Jill Schachner Chanen, *A Warning to Collaborators*, A.B.A. J., May 2007, at 22, 23.

<sup>237</sup> MACFARLANE, *supra* note 124, at vii.

<sup>238</sup> *Id.* ("If the client decides that legal action is ultimately necessary . . . the collaborative lawyer . . . must withdraw and receive no further remuneration for work on the case").

<sup>239</sup> The term "Four-Ways" takes its name from the combination of the parties and the parties' lawyers in the typical two-party dispute.

<sup>240</sup> MACFARLANE, *supra* note 124, at 29.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Robert W. Rack, *Settle or Withdraw: Collaborative Lawyering Provides Incentives to Avoid Costly Litigation* (Spring 1998),

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Whether the CFL movement is more hype than reality is an interesting question—good arguments exist on both sides—but the question is also well beyond the scope of this article. CFL methods do not seem to produce settlements that are very much different from those produced by traditional bargaining methods (even its practitioners acknowledge that)<sup>244</sup> but they might have a "value-added" dimension that makes them more satisfying and effective to use.<sup>245</sup> Be that as it may, the relevant question for our purposes is whether Professor Macfarlane's study tells us anything new about the comparative effectiveness of communitarian bargaining. Like the Williams and Schneider Studies before it, the Macfarlane Study is based on data collected from lawyer responses to opinion surveys and interviews. The difference is that Macfarlane's questions were more open-ended than those of her predecessors, and the answers she received were correspondingly more wide-ranging. This, along with the fact that her respondents were selected for their self-identification with CFL practice rather than randomly, may account for the fact that the answers often read more like testimonials to CFL methods than descriptions of effective bargaining generally. The responses frequently are vague, conclusory, a little overwrought, and lacking in the evidentiary detail needed to explain what they mean or why they should be believed.<sup>246</sup> Many also have a kind of "peace, love, and harmony" aura about

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[http://www.collablawtexas.com/article\\_settle\\_or\\_withdraw.cfm](http://www.collablawtexas.com/article_settle_or_withdraw.cfm) (last visited Mar. 4, 2008).

<sup>244</sup> MACFARLANE, *supra* note 124, at 57. They also admit that they revert to adversarial methods on occasion, usually when communitarian methods are not reciprocated and in "endgame" situations. *Id.* at 31–32. This is reminiscent of Professor Ury's hostage negotiator who brought his adversary to his senses only because it was not necessary to bring him to his knees. *See supra* note 123 and accompanying text.

<sup>245</sup> At least this is what CFL proponents claim. MACFARLANE, *supra* note 124, at 58–59 (quoting CFL practitioners describing these value-added features as including "enhance[d] . . . communication between the parties which enable[s] them to explore their understanding of what [feels] 'fair,'" the opportunity to "negotiate creative alternatives to support, custody and access," the ability to "explore [certain kinds of issues] more deeply," and "more effective involvement and joint decision making in co-parenting"). On the other hand, Macfarlane concludes that "the level of emotional resolution achieved via the [CFL] process was perhaps not as great as the lawyers had anticipated or hoped for at the outset—nor as deep as they believed was achieved by the end." *Id.* at 60. As one client put it, "Trust building is a big . . . and . . . deep issue in a 20 year relationship, and this is probably too deep for a legal process [CFL] to handle." *Id.* Or, as another said, sometimes "the CFL process is not that different from a traditional lawyer-to-lawyer negotiation, 'mostly lawyer-talk, just more polite,'" particularly if "cooperation [is] not forthcoming from the other side." *Id.* at 31.

<sup>246</sup> MACFARLANE, *supra* note 124, at 30–31 ("there is much [less] opportunity for polarization and mistrust [in CFL];" "the dynamics of [CFL] change how people behave,

them that reminds one of the Sixties (and an accompanying authoritarian shadow also reminiscent of that period),<sup>247</sup> that seems to say, "technique is bad, rights talk contaminates, all disputes have right answers and you will find your way if you just chill out."

To her credit, Macfarlane interprets these answers rather than accepts them. She appreciates that many CFL practitioners want to believe that their methods work and have convinced themselves that they do based on limited if not non-existent data. She points out gaps and inconsistencies in the answers, describes considerations left out, and constructs a reasonably complete picture of CFL practice, warts and all. She sees the question of CFL's effectiveness as a debatable one, and ends up describing a qualified and enhanced version of the method as a more attractive option than the original. She presents a "for and against" case with balance and integrity,

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once they start hearing the reality of their case from other people;" "I actually find [CFL] quite different;" there is a "conscious avoidance of . . . adopting the extremes;" "I have the confidence to say to my client 'Let's not talk about [inflated demands], it's a waste of your time;" "positional bargaining simply does not work in CFL"). *See also* Menkel-Meadow, *supra* note 8, at 500 ("I believe that 'small is beautiful' and 'local is global' [and that] we should all keep working . . . to make the world a better, more peaceful place through negotiation.").

<sup>247</sup> Comments by CFL clients illustrate the method's authoritarian side. For example, some clients saw the constant reminders by CFL attorneys to remain cooperative and focus on the interests of the group as "an attempt to impose a false 'harmony' on the situation," and forced community can be oppressive. MACFARLANE, *supra* note 124, at 34. Others were "sometimes mystified by the lengths to which their lawyers believe[d] they must go to remove the possibility of litigation, and wonder[ed] why counsel could not simply be trusted to use their best judgment in this eventuality." *Id.* at 39.

[Another didn't] quite understand the need for such a strong bias against the CFL attorney representing [the client] in the case of later litigation. After the CFL process has failed, [the dispute] becomes just another type of case and . . . having all the background information and knowing the other parties would make for a smoother litigation.

*Id.* at 40. Yet another client explained how CFL representation could be constraining: "After an estimated \$24,000 in professional fees and nine months of negotiations—with little accomplished—it was difficult to switch tacks and litigate. 'Now that we're this far, it's hard to leave.'" *Id.* at 39. Surprisingly, CFL representation often was as expensive as traditional representation and as time consuming as well. *Id.* at 79. Finally, and in the best traditions of authoritarianism generally, CFL lawyers were encouraged to report one another to the CFL group when they became "unnecessarily adversarial" and violated the CFL "'club' culture." *Id.* at 33. Some CFL groups had even begun to develop expulsion procedures (though there was no indication yet that the procedures were conducted in public, to a drum roll background, and in front of the entire Battalion). MACFARLANE, *supra* note 124, at 33.

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shows how communitarian and adversarial practices can work together to supplement one another, and how the two approaches in combination can be more effective than either standing alone. She could do more to describe this conjoined point of view and probably will if she continues to work in the field.<sup>248</sup> Even if she does not, her present study demonstrates that both adversarial and communitarian bargaining methods have value, and that it is possible to construct a hybrid method of bargaining based on the best features of each. Her study is an example of a genuinely communitarian approach to the discussion of bargaining theory—one which is inclusive, collegial, and bilateral. It is an example of communitarian theory being communitarian.

### 4. *Future Studies*

There are dozens of additional empirical studies of both communitarian and adversarial bargaining,<sup>249</sup> some more carefully conducted than those just

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<sup>248</sup> It is not clear whether collaborative law practice is a long-standing research interest of Macfarlane's or just an occasion for writing a commissioned report. Her study appears to be a one-time event, prepared for presentation to the Family, Children and Youth Section of the Department of Justice for Canada.

<sup>249</sup> There is another large body of work, nominally about mediation, that also contains a good deal of comparative analysis of different bargaining methods (because mediation is just multi-party bargaining). It is common for articles of this sort to make the "value added" argument, that parties prefer communitarian methods because they provide greater party control over the settlement process, permit a wider range of possible resolutions, make the experience of bargaining more personable, and produce greater party compliance with agreed-upon outcomes. These claims are noteworthy as much for the number of times they have been repeated as for the evidence marshaled in their support. Most of the early work of this sort was grounded, directly or indirectly, on a 1981 study of mediation in Maine that subsequent studies did not always support. Compare Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981) (stating that mediation more likely to produce greater party compliance with agreements than litigation), with Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515 (1984) (stating that whether defendant admits partial liability is a more important characteristic than the type of procedural forum in predicting extent of party compliance with agreements). The debate continued for one more round. Compare Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986), with Neil Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987). McEwen and Maiman did not give up. See Craig A. McEwen & Richard J. Maiman, *Explaining a Paradox of Mediation*, 9 NEGOT. J. 23 (1993) (arguing that

described and others less so, but invariably these studies are based on either lawyer opinions about bargaining effectiveness or patterns in the way university students play bargaining games. Judgments based on lawyer opinions are not trustworthy because lawyers do not always bargain in the manner they say (or think) they do. Their descriptions of bargaining are often more self-tribute or self-deception than self-examination, shaped by hopes, expectations, defenses, and preconceived notions more than what happens on the ground.<sup>250</sup> Judgments based on student game-playing, on the other hand, ignore both the effects of professional socialization and institutional setting on bargaining behavior, and the way in which the distinctive personal and social networks within which lawyers work influence the practices and values they internalize and live by.<sup>251</sup> Students live in a world of networks,

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mediation is particularly powerful and effective when parties are reluctant to enter the process voluntarily); see also Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J. L. & SOC. PROBS. 451 (1985) (finding greater compliance with mediation awards than adjudicated judgments); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995) (finding that compliance is not significantly related to defendants' outcome). For the best background discussions, see generally THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neal Milner eds., 1993); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295 (1974).

<sup>250</sup> Condlin, *Bargaining with a Hugger*, *supra* note 7, at 60–71.

<sup>251</sup> Barbara Bergmann makes a similar point about the empirical methods of "professional economists." Barbara R. Bergmann, *Needed: A New Empiricism, ECONOMISTS' VOICE* 1 (March 2007), available at <http://www.bepress.com/ev/vol4/iss2/art2/> (last visited Mar. 4, 2008).

[E]ven the experimentalists and behaviorists do little if any direct interacting with the people who manage businesses as they actually conduct their affairs. It is assumed that the students they pay to come to their laboratories are stand-ins for them, and that the students' behavior patterns will predict that of the managers. One might argue that economists would do best if they adopted the strategy of anthropologists who go to live with the tribe they are studying and become participant-observers.

*Id.* at 2. Janet Alexander's study of Silicon Valley securities litigation is an excellent example of such an anthropological study. Alexander, *supra* note 43. For other discussions of the differences between experienced and inexperienced bargainers, see Russel Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look as the Role of the Lawyer*, 76 TEX. L. REV. 77, 113 (1997) (summarizing their



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institutions, values, and practices as well, of course, but one peculiar to schooling, and while they often bargain in interesting ways, they do not do so in the same ways as lawyers. In the end, neither lawyer opinion surveys nor student game-playing patterns provide the type of data needed to construct an accurate profile of lawyer bargaining.

The best way to study lawyer bargaining is to study it directly, based on recordings and transcripts of actual lawyer negotiation. This kind of data would eliminate debates about how lawyers behave in negotiation and permit commentators to focus on the more interesting questions of what the behavior means, how it is perceived, and what are its effects. Most commentators do not work with such data because it is too difficult to collect. Clients and lawyers would have to consent to having negotiations recorded, for example, and most will not. Information exchanged in negotiation may or may not be privileged,<sup>252</sup> but it is at least private, and in

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experiments as showing that "lawyer subjects were not affected to nearly the same degree as litigant . . . subjects by the framing, anchoring, and equity-seeking variables tested"); *id.* at 121–22 ("our results suggest that lawyers are more likely to explicitly or implicitly employ expected financial value calculations when considering litigation options"); Linda Babcock, Henry S. Farber, Cynthia Fobian, & Eldar Shafir, *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 294–95 (1995) (describing differences in the way students and lawyers calculate expected adjudicated outcome); Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017, 2028–33 (2006) (describing how professional "reinsurers resisted the influence of anchoring on their judgments," but "student subjects" did not); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 757 (2000) ("novices in a field or one-shot players are unlikely to have had enough experience to have received adequate feedback" to adjust for their biases); Orr & Guthrie, *supra* note 2, at 622–23 ("anchoring effects are somewhat less pronounced among experienced negotiators"); Hazard, *supra* note 232; Guernsey, *supra* note 232; Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

<sup>252</sup> Rule 408 of the Federal Rules of Evidence and its state law analogues are the principal regulations governing the availability in discovery of information disclosed during settlement negotiations. For discussions of these rules, see Jane Michaels, *Rule 408: A Litigation Mine Field*, 19 LITIG., Fall 1992, at 34; Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Russell Korobkin, *The Role of Law in Settlement*, in THE HANDBOOK OF DISPUTE RESOLUTION 254 (Michael L. Moffitt & Robert C. Bordone eds., Jossey-Bass 2005). Private information disclosed in negotiation also can be regulated by confidentiality agreements between the parties, though there are many policy objections to such agreements and state laws often preclude them. See Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11:6 ALT. TO THE HIGH COST OF LITIG. 85 (June 1993); Laurie K. Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

most instances there is no particular reason clients would want to make it public. Lawyers also will be reluctant to reveal the strategies and techniques they think give them an advantage in bargaining with others, though this advantage is easily overestimated.

If live bargaining data is not an option, scrupulously faithful facsimiles are the next best possibility. The most useful of these alternatives is the well constructed simulated negotiation, one based on an actual bargaining case, conducted spontaneously—not according to a script—by practitioners experienced in the matters being negotiated, working with actual case materials (documents, physical evidence, live witnesses, and the like), in real-life contexts, and under real time conditions.<sup>253</sup> Such simulations won't reproduce actual negotiation perfectly, since it is almost impossible to simulate the social relationships and interpersonal histories of the parties, witnesses, and lawyers that make up an extended real-life negotiation.<sup>254</sup> But simulations will reproduce the full range of skill maneuvers that constitute the bargaining conversation, and these maneuvers are the central focus of much negotiation scholarship.

With data of this sort it would be possible to discuss such questions as whether an adversary's comments were threatening or the listener unduly defensive, whether an adversary's demands were excessive or the listener excessively stingy, whether an adversary was loud and belligerent or the listener overly sensitive, whether an adversary was arrogant or the listener unusually insecure, and the like. Each of these topics triggers strong emotions in lawyers, and relying on negotiation participants both to describe such behavior accurately and evaluate it objectively often produces a kind of vicious analytical circle. To avoid circularity, one needs a record of what happened that is constructed independently of the parties' beliefs about the effectiveness of the behavior involved. Tape recordings and transcripts of

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<sup>253</sup> Orr and Guthrie seem to agree. Orr & Guthrie, *supra* note 2, at 614. They base their analysis of anchoring effects in negotiation, for example, on observations of simulated negotiations and exclude data taken from survey reports. *Id.* Bargaining scholarship needs dozens, if not hundreds, of such negotiation case studies. Collectively, they would constitute a phenomenology of bargaining, providing images of all of the variations in bargaining styles.

<sup>254</sup> It also is impossible for a simulated negotiation to trigger all of the motivational forces present in real-life bargaining. In simulations there are no sympathetic clients to be helped, no large fees to be earned, and no causes to advance. The complete absence of real-world consequences and relationships takes these factors out of the picture. A simulated negotiation triggers only the lawyer's ego interest in performing successfully. Ego is a powerful and pervasive force, however, and in some circumstances it has more influence on lawyer behavior than any of the above factors.

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simulated negotiations hold out the greatest hope for producing such a record.

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The empirical arguments for communitarian bargaining differ in numerous respects but they also have several qualities in common. They make general claims about bargaining practice based on cartoon data about stylized, overly simple, non-legal disputes in a manner that is more often gimmicky than real. They tout maneuvers and techniques that work in limited contexts and have little application to ordinary bargaining problems as examples of best bargaining practice across the board. And they defend these claims in a manner that bespeaks more of prestidigitation than reasoned elaboration. The complete case for the communitarian method, both its normative and critical dimensions, rejects the possibility of intractable conflict and the existence of incommensurable values and beliefs, ignores the compressed time frames and constricted social relationships within which bargaining is conducted, and closes its eyes to many of the practical constraints of real-life situations that do not fit easily into its idealized communal model of bargaining interaction. It also is gratuitously competitive and unfair in the way it describes and dismisses adversarial approaches to bargaining, misleading in the manner it reports and uses empirical data, and imperialist in the attitude it takes toward the world of bargaining theory generally. It is based mostly on prescriptive writing grounded in aesthetic and ideological preferences, with little in the way of empirical evidence to back it up. As an argument, it seems based on the assumption that life imitates (communitarian) theory, if it knows what's good for it.

If communitarian theory is warmed over adversarial technique—aggressiveness with a post-modern face, so to speak—one reasonably might wonder what the shouting is all about. Surely there must be something new here, or we would not have had the furor of the last twenty years. There is one way in which communitarian theory is different, though it may not help much: It is much better at promoting itself than is adversarial theory. Testimonials of communitarian scholars trumpet the contributions of the theory to such things as deliberative democracy and personal transformation<sup>255</sup> with an extravagance and sense of self-importance that goes well beyond anything found in the literature on adversarial bargaining.

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<sup>255</sup> See, e.g., ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (Jeffery Z. Rubin, ed., 1994); Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135 (1999); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005).

In colloquial terms, communitarians talk a much better and bigger game. One should be careful, however, around those who extol the purity of their motives and the sophistication of their practices before either is called into question. Such qualities, if real, usually do not need to be pointed out. Others notice on their own. Rather than wait for that to happen, however, communitarians have engaged in a kind of pre-emptive campaign to credit the character of their method, using their own aesthetic preferences and personal beliefs as evidence. This is another instance in which it would be better to count all of the votes.

Given these difficulties, it is remarkable that so many legal academics have accepted the argument for communitarian bargaining at face value. Communitarians seemingly have been given a free pass on the issue of proof at a time when the demand for empirical justification is greater than ever in the academy. The legal professoriate must think nothing very important is going on in the debate over bargaining theory, or they must have a very great hatred for adversary methods generally, to be so quick to embrace the communitarian alternative. On the other hand, communitarians may owe their success more to their own tactical cleverness than to any particular feature of the legal bargaining world. In a sense, they outflanked adversarial bargainers by reconstituting the world in which bargaining operates in exclusively communal terms. This, in turn, permitted them to redefine the nature of bargaining effectiveness and make adversarial bargaining obsolete; to supplant it without ever having proved it wrong. And they did all of this principally by means of a virtuosic, rhetorical, *meta* move. In their own terms, they "chang[ed] the game . . . [by] chang[ing] the frame."<sup>256</sup> Jim White would be proud.<sup>257</sup>

### III. CONCLUSION

If the twenty-five year debate between communitarian and adversarial theories of bargaining effectiveness is a negotiation of sorts, it is hard to resist the conclusion that communitarians are the better negotiators. They have advanced their interests and defended their turf more aggressively and successfully than their adversarial counterparts, and in the process even taught the latter a thing or two about what it means to be adversarial.<sup>258</sup> The

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<sup>256</sup> See URY (rev. ed.), *supra* note 82, at 78–80.

<sup>257</sup> See Menkel-Meadow, *supra* note 27.

<sup>258</sup> Communitarians prefer their aggression passive because that permits them to deny it. Passive aggressive strategies can be as effective as overt ones, of course, but because they are surreptitious they also are less respectful of others.

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irony in this will not surprise anyone familiar with the ways of the world. Only a communitarian would be shocked to learn that he was as competitive and self-interested as the next person when his own interests were at stake. But it does raise an interesting question of whether the success of the communitarian assault on bargaining theory should cause the legal profession to rethink its understanding of effective bargaining. It is still, at least, an open question whether communitarians have constructed a new, more communal conception of the bargaining universe on which all can build, or instead have simply created a new linguistic orthodoxy based on the re-labeling of familiar bargaining technique in communitarian terms. Given the academic hazards involved in trying to answer such a question, perhaps it would be better to let go of the adversarial-communitarian dichotomy altogether. It is a phony dichotomy after all. We are all both adversarial and communitarian as our situations and interests dictate, and a complete theory of bargaining effectiveness would draw extensively on both schools of thought. We need a hybrid conception of bargaining, in other words, one that makes room for both individualist and communal strategies and goals, if our bargaining theory is to reflect all of the dimensions of our bargaining practice.<sup>259</sup> Hybrids are not as attractive as pure types, of course, particularly in the academy, but then beauty must make its peace with truth or neither will survive. Glass slippers are pretty, but we learn in childhood that they also can pinch, and that one size does not fit all.

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<sup>259</sup> *Accord* Menkel-Meadow, *supra* note 39, at 572–76 (describing new "hybrid" processes "for human governance" that point "the way forward" to more effective dispute settlement). Lax and Sebenius's "creating/claiming" conception is perhaps the most sophisticated example of how the adversarial and communitarian aspects of bargaining can be combined. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986).

